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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 401.

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S. Court
74

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM M. BUTLER *et al.*, Receivers of Hoosac Mills Corporation,
Respondents.

BRIEF OF *AMICI CURIAE* WITH PETITION, NOTICE AND APPENDICES.

NATHAN L. MILLER,
JOHN W. DAVIS,
WILLIAM R. PERKINS,
Attorneys for Amici Curiae.

THE COURT PRESS, N. Y. C.

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v.

WILLIAM M. BUTLER et al., Receivers of Hoosac Mills Corporation,

Respondents.

Notice of Motion for Leave to File a Brief as Amici Curiae.

PLEASE TAKE NOTICE that the undersigned, acting as counsel for litigants interested in the questions involved in the above entitled suit, will move this Court at the hearing of this case on the 9th day of December, 1935, or as soon thereafter as the case may be heard, for leave to file a brief as *amici curiae* and for such other or further relief as may be proper.

New York, November 15th, 1935.

NATHAN L. MILLER,
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IN THE

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OCTOBER TERM, 1935.

No. 401.

UNITED STATES OF AMERICA,

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WILLIAM M. BUTLER et al., Receivers of Hoosac Mills Corporation,

Respondents.

Petition for Leave to File Brief as Amici Curiae.

The undersigned respectfully petition this Honorable Court for leave to file a brief *amici curiae* in the above entitled suit.

Your petitioners apply as counsel for Hygrade Food Products Corporation, National Biscuit Company, a corporation and P. Lorillard Company, a corporation, respectively. Each of these concerns is a processor of a basic agricultural commodity in one or more factories located and operated in the United States. As such it is subject in that respect to the terms and provisions of the Agricultural Adjustment Act, familiarly known as the AAA. And against each the United States is asserting its right to assess and collect taxes under the terms and provisions of said Act,

Each of these concerns has brought a suit in equity in a Federal District Court (as have other like concerns, so that the number of such suits now aggre-

gates largely over one thousand) in which is sought an order restraining the further collection under said Act of taxes accrued both before and after the amendments of August 24, 1935, on the ground that said Act is wholly unconstitutional and that the claim for refund, for many years existing as an established procedure for contesting such constitutionality, has been so circumscribed by amendments to the said AAA as to render said procedure totally inadequate as a legal remedy as well as entirely lacking in the elements of due process of law required for that purpose.

Each of said concerns, therefore, is vitally interested in a decision of the constitutional questions presented in the above entitled suit.

Notice of this application having been served on counsel for the respective parties in the above entitled suit, this motion is now respectfully submitted for the consideration and action of the Court.

New York, November ~~22nd~~ 20th, 1935.

NATHAN L. MILLER,
JOHN W. DAVIS,
WILLIAM R. PERKINS,
Attorneys for Amici Curiae.

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BRIEF OF AMICI CURIAE.

I.

Statement.

Hygrade Food Products Corporation, National Biscuit Company, a corporation and P. Lorillard Company, a corporation, file this brief *amici curiae* in opposition to the contention of the petitioner that the Agricultural Adjustment Act, familiarly known as the AAA, is constitutional and gives to petitioner the right to assess and collect taxes in the manner and for the purposes it provides.

Each of said concerns is a processor of a basic agricultural commodity in one or more factories located and operated in the United States. As such it is subject in that respect to the terms and provisions of said AAA. And against each the United States

is asserting its right to assess and collect, under the terms and provisions of said Act, taxes accrued and accruing before and after the 1935 Amendments.*

Each of these concerns has brought a suit in equity in a Federal District Court (as have other like concerns, so that the number of such suits now aggregates largely over one thousand) in which is sought an order restraining the further collection under said Act of taxes accrued both before and after the amendments of August 24, 1935, on the ground that it is wholly unconstitutional and that the claim for refund, for many years existing as an established procedure for contesting such constitutionality, has been so circumscribed by limitations thereof by Sec. 21, added by Sec. 30 of the 1935 Amendments, as to make said procedure an inadequate legal remedy and entirely lacking in the elements of due process of law required for that purpose.

Thus each of said suits presents the very same constitutional questions that are involved in the above entitled suit, as well as the right of these concerns to contest such constitutionality by suit in equity, in view of the exceptional circumstances presented by the novel provisions of the AAA and the inadequacy of, and lack of due process in, the procedure by claim for refund under the said limitations thereon.

II.

AAA is a complete counterpart of NRA.

The AAA, in all essentials, from its inception has been and still is under the 1935 Amendments, a complete counterpart of the NRA, recently considered by this Court in the *Schechter* case (295 U. S. 495) and found beyond the constitutional powers of Con-

* Public No. 320, 74th Congress, approved August 24th, 1935, for brevity in this brief called "the 1935 Amendments".

gress. The two Acts are complementary expressions of the same theory of the nature, scope and function of the Federal Government. Both attempt rehabilitation through regulation by a centralized power—the NRA of industry through a regimentation vested in the discretion of the President, and the AAA of agriculture through a regimentation vested in the discretion of the Secretary of Agriculture. In both, for the very same fundamental reasons, the attempt is in total disregard of the rights of the States and the citizens, as well as of the diverse powers vested in the coordinate branches of our Government, and on that account utterly unconstitutional.

The declared "policy of Congress" in the AAA has been, and still is, "to establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish prices to farmers" at a prescribed level, measured in terms of articles that farmers buy with respect to selected basic periods (Sec. 2 of the AAA and Secs. 1(a) and 62 of the 1935 Amendments). This corresponds to the declared policy of the NRA (Sec. 1) for industry under the terms of that Act.

This policy the AAA undertakes to effectuate by the inauguration of what has been aptly termed "the philosophy of scarcity", which it seeks to impose and maintain through the delegation to the Secretary of Agriculture for that purpose of large discretionary powers with respect to agriculture, just as the NRA to effectuate its policy delegated similar large discretionary powers to the President with respect to industry.

The Secretary is authorized "to provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural com-

modities, through agreements with producers or by other voluntary methods" in consideration of "rental or benefit payments" he is authorized to make to such producers for such purpose out of funds made available by the AAA therefor (Sec. 8 of the AAA and Sec. 2 of the 1935 Amendments). These agreements in all respects—existence, terms, payments—rest in the absolute discretion of the Secretary for effectuating the declared policy of the AAA, and correspond to the codes which likewise rested in the absolute discretion of the President for effectuating the policy of the NRA. And for this purpose they bring agriculture under the control of the Executive Department of the Federal Government, represented by the Secretary of Agriculture, just as the codes brought industry under the control of the Executive Department of the Federal Government, represented by the President.

Funds for these "rental or benefit payments" are "derived" through a tax levied by the AAA "upon the first domestic processing of the commodity" which "shall be paid by the processor" (Sec. 9(a) of the AAA and Sec. 11 of the 1935 Amendments). This tax embraces "floor stocks" on hand at its incidence (Sec. 16(a) of the AAA) and may be extended at the discretion of the Secretary to the processing of competing or imported commodities to prevent shifting from agricultural commodities upon the processing of which the tax is being levied (Secs. 15(d) and 15(e) of the AAA and Secs. 23 and 24 of the 1935 Amendments). Heretofore Sec. 12(b) appropriated *"the proceeds derived"** from all taxes imposed under this title" for "administrative expenses, rental and benefit payments, and refunds on taxes", whereas now, as amended by Sec. 3 of the 1935 Amend-

* Italics are ours unless otherwise stated.

ments, this section appropriates for those purposes "a sum equal to *the proceeds derived* from all taxes imposed under this title". But no difference in substance arises from this difference in language, since each appropriates only "the proceeds derived" from the taxes as, when and to the extent "derived" therefrom. There can be no "sum equal to the proceeds derived" from the taxes imposed unless and until those proceeds have been thus derived; the derivation is a condition precedent to the effectiveness of the appropriation.

This taxation, in all essential respects, rests wholly in the discretion of the Secretary of Agriculture for the effectuation of the declared policy of the Act. Now, as heretofore, as respects each basic agricultural commodity, it begins and ends as and when he in his discretion determines and proclaims the commencement or termination of "rental or benefit payments" with respect to such commodity (Sec. 9(a) of the AAA and Sec. 11 of the 1935 Amendments); at any time and from time to time, as his discretion dictates, he may exclude from the operation of the tax any commodity, or classification, type or grade thereof, suspend the tax, cause a refund thereof, and exempt processors from its payment (Secs. 11, 15(a) and 15(b) of the AAA and Secs. 8, 21 and 61 of the 1935 Amendments); and said Sec. 9(a) still, as heretofore, expressly provides that the rate of the tax "shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds it necessary to effectuate the declared policy, be adjusted by him to conform to such requirements".

While the Act provides an indefinite general standard for the rate (Sec. 9(b) of the AAA and Sec. 12 of the 1935 Amendments) and specific rates

are imposed on the respective agricultural commodities by Pars. (2), (3), (4) and (5) of the provisions added to Sec. 9(b) by Sec. 12 of the 1935 Amendments, it is nevertheless true that the quoted provision of Sec. 9(a), as to the rate of the tax, still obtains and controls, and gives the Secretary complete discretion to adjust the rate as he thinks desirable to effectuate the declared policy of the Act. This is shown in a detailed analysis of these provisions which we annex as Appendix A. Briefly stated: Pars. 9(b) (1) and (6) (A) of the provisions added to Sec. 9(b) by Sec. 12 of the 1935 Amendments expressly authorize the Secretary to *decrease* such rates, "including a decrease to zero", as he may find necessary or desirable to prevent the AAA and the operations thereunder from causing either an accumulation of stocks or depression of prices in any commodity or product thereof for any use or uses thereof; and Par. (6) (D) of the provisions added to Sec. 9(b) by Sec. 12 of the 1935 Amendments expressly authorizes the Secretary to *increase* such rates "in accordance with the formulae, standards and requirements *prescribed in this title*", which of course includes the quoted provision of Sec. 9(a) authorizing the Secretary to make such adjustments of such rates as he may consider necessary to effectuate the declared policy of the Act.

This construction is confirmed by the following provision added to Sec. 9(c) by Sec. 13 of the 1935 Amendments:

> "The rate of tax upon the processing of any commodity, in effect on the date on which the amendment is adopted, shall not be affected by the adoption of this amendment, and shall not be required to be adjusted or altered, unless the Secretary of Agriculture finds that it is

necessary to adjust or alter any such rate pursuant to section 9(a) of this title."

Under this power the Secretary has stoutly asserted his right to maintain rates above the general standard enunciated in Sec. 9(b). Illustration of this is afforded by the opinion of Judge Kirkpatrick in *Vogt* v. *Rothensies* (D. C. Pa., 11 F. S. at 229-30) in which he said:

> "On the basis of the latest available data the formula now gives a rate of 81¢ per hundredweight, but the rate of tax is and has been since March 1934, $2.25, and the Secretary proposes to maintain it at that figure until he is satisfied that a reduction of the tax will not destroy the desired balance. Not only is this the effect of the Act, but the argument is a plain assertion by the defendant that the apparently definite and easily ascertained formula may be disregarded by the Secretary, leaving the policy of the Act as the only semblance of control of his discretion."

While Subdiv. (G) of Par. (6) of Sec. 9(b), added by the 1935 Amendments, provides that, in case AAA is declared unconstitutional, then, in lieu of all rates fixed in pursuance of Par. (6) there shall be assessed and collected the rates specified in Pars. (2), (3), (4) and (5), this provision, as shown in Appendix A, in nowise controls the discretion of the Secretary as to rates until such unconstitutionality is declared, and then only with respect to rates he may have fixed under Par. (6) of Sec. 9(b), which excludes those he may have fixed under this broad discretion given him by Sec. 9(a).

Finally, the Secretary is authorized to impose a system of regimentation on the handling of agricultural commodities and their products, violation

of which subjects the offender to severe penalties. Sec. 8(3) of the AAA authorized the Secretary "to issue licenses *permitting* processors" to handle such articles upon "such terms and conditions" as he thought would effectuate the declared policy. By Secs. 5 and 6 of the 1935 Amendments this section has been expanded into Secs. 8(c), 8(d) and 8(e), which authorize the Secretary, with the assent or at the instance of a required percentage of the producers of a given commodity, to impose a system of "orders", the terms of which at his discretion may, as respects any such commodity or product, or grade, size or quality thereof, limit the total quantity which may be marketed, allot the amount thereof which each handler may acquire from producers and market, determine the disposition of any surplus, establish and dispose of reserve pools, prohibit unfair methods and practices, prevent sales at prices differing from those filed in the manner provided in such order, and establish agencies for the administration of the AAA, which may be associations of producers, the expenses of which shall be borne by the processors. Congress may not control to this extent even the commerce that is subject to its regulation (*Hammer* v. *Dagenhart,* 247 U. S. at 274-6; *Adkins* v. *Children's Hospital,* 261 U. S. at 545-55; *Brooks* v. *United States,* 267 U. S. at 438).

III.

Long established constitutional principles control.

This analysis of the essential provisions of AAA makes it plain that that Act is a comprehensive scheme whereby

(1) through inadmissible delegation of legislative powers to the Executive Department, repre-

sented for this purpose by the Secretary of Agriculture,

(2) it is sought to control the internal affairs of the States, to wit, the production and processing of agricultural commodities,

(3) and as an aid in so doing to take, through the form of taxation, imposed in an arbitrary, capricious and discriminatory manner, the property of one set of private citizens, to wit, the processors, and bestow it on another set of private citizens, to wit, the farmers, for their own private benefit, as a consideration to induce these farmers to accede to this Federal control.

We make this succinct statement, throwing into bold relief this true picture of AAA (in advance of our argument that its essential provisions, taken separately, are unconstitutional) because thus viewed as a whole it presents, as did NRA, a manifest attempt by the Federal Government to accomplish precisely the one thing above all others which our forefathers feared and sought to prevent, namely, a vast power, centralized in a single branch or individual, which should endeavor to govern and control, in disregard of the rights and powers they wished reserved and preserved to the States and to the citizens.

Every student of our Government knows it was to this end that the Constitution was so framed as to make the Federal Government one of enumerated powers, which might not be transcended, with these powers vested in three independent, coordinate branches, no one of which might delegate its own powers or usurp those of another. And, further, so tremendously important did our forefathers regard these rights and powers that, with a fine in-

sight into their real worth and a most prophetic foresight of just what is now occurring, they were unwilling to trust their protection entirely to this careful framing of the Constitution, but required as a condition of ratifying the Constitution that they be further safeguarded by their incorporation, as they later were incorporated, in the first Ten Amendments, which have been aptly termed the "American Bill of Rights". See: *McCulloch* v. *Maryland,* 4 Wheat. 316, 421-3; *Ex parte Milligan,* 4 Wall. 2, 120; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555; and *Schechter* v. *United States,* 295 U. S. 495.

Thus it came to pass that the Tenth Amendment reserves to the States respectively or to the people all the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, which thus reserved to each State the power to regulate its internal commerce, since the power of Congress to regulate commerce is confined to that "with foreign nations and among the several States and with the Indian Tribes" (*Martin* v. *Hunter's Lessee,* 1 Wheat. at 324-6; *Schechter* v. *United States,* 295 U. S. at 528-9, 546, 550).

Thus it also came to pass that the provision upon which it is not too much to say there has been erected, and now rests, all that is legally worth while in what we call civilization, namely, the due process clause and its kindred provision that property may not be taken for even a public use without just compensation, have been imposed as express limitations by the Fifth Amendment upon all of the enumerated powers of the Federal Government (*Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. at 589, and the cases cited in Note 19 thereto)

and prevent private property from being taken by taxation or condemnation for another private citizen (*The Citizens' Savings & Loan Assn.* v. *Topeka,* 20 Wall. at 662-7; *United States ex rel. The Miles Planting & Mfg. Co.* v. *Carlisle,* 5 App. Cas. D. C. 138; *Heiner* v. *Donnan,* 285 U. S. at 326).

These simple, familiar and long established constitutional principles furnish the true answer to the questions presented in this case and require a holding that on account thereof AAA is entirely unconstitutional.

IV.

Crop control by the Federal Government under AAA is unconstitutional and renders the whole act abortive and void.

Unquestionably, crop reduction is the key to the accomplishment of the declared policy of AAA. It is the single essential means which the Act adopts for that purpose. Unless the production of crops can be thus regulated, and thereby reduced, by the Federal Government under the terms of AAA, the Act is devoid of means for the accomplishment of its declared policy and necessarily falls.

But agriculture, the production of crops, and therefore crop reduction and agreements and methods for that purpose, are intrastate activities, and thus beyond the regulatory power of the Federal Government, which extends only to the commerce occurring with foreign nations and among the several States and with the Indian Tribes, as we have just seen.

So also, for the same reason, it is likewise true that the processing of agricultural commodities, which AAA attempts in a measure to regulate, is an intrastate activity, beyond such reach of the Federal Gov-

ernment. Processing is simply manufacturing, and so defined by the Act (Sec. 9(d) of AAA).

The above propositions are well established by express decisions of this Court too numerous to mention. In the very latest, *Schechter* v. *United States* (295 U. S. at 547), Chief Justice Hughes quoted with approval the statement that "building is as essentially local as mining, manufacturing or growing crops" and held that the Federal Government might not determine the wages or hours of employees in factories because that would be to regulate an intrastate activity, not direct in its effect on interstate commerce, and make Federal regulatory power embrace "practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government".

It being thus true that Congress may not regulate such intrastate activities directly, it follows that Congress may not accomplish such regulation through indirection. The expressions of and limitations upon the enumerated powers of the Federal Government are too important and binding to be thus circumvented.

For instance, the fact that an article being produced or processed is intended to move in interstate commerce does not subject that article to the regulatory powers of Congress until the movement in interstate commerce has begun. Commerce succeeds to production and manufacture and is not a part of it. In express point are: *Coe* v. *Errol,* 116 U. S. at 526-8; *Kidd* v. *Pearson,* 128 U. S. at 20-4; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. at 259-60; *Kansas* v. *Colorado,* 206 U. S. at 87-91; and *Chassaniol* v. *Greenwood,* 291 U. S. at 586-7. In the *Heisler* case it was

said that "the reach and consequences of the contention repel its acceptance" because it would

> "nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production."

Similarly, one who engages in interstate commerce does not thereby submit his intrastate activities to Federal control. Chief Justice (then Mr. Justice) White in *Howard* v. *Illinois C. R. Co.*, 207 U. S. at 502, said of this suggestion that "to state the proposition is to refute it" because:

> "It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been,

> and must continue to be, under their control so long as the Constitution endures."

See also *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. at 357, 368, holding the Railroad Retirement Act unconstitutional.

Again, as indicated in the quotation just made, Congress may not condition engaging in interstate commerce upon compliance with regulations it seeks to impose upon intrastate activities. Such was the case of *Hammer* v. *Dagenhart*, 247 U. S. 251, where the Court held unconstitutional an Act of Congress which sought to regulate child labor in factories through the exertion of its power over interstate commerce, saying:

> "To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States" (p. 276).

And so eminent and profound a student of our Government and its policies as President Wilson strongly maintains and endorses the very same view in his work on "Constitutional Government in the United States" (1908 Ed.) at pages 170-2 and 191-2, giving it as his opinion that:

> "It would be fatal to our political vitality really to strip the States of their powers and transfer them to the federal government. It cannot be too often repeated that it has been the privilege of separate development secured to the several regions of the country by the

Constitution, and not the privilege of separate development only, but also that other more fundamental privilege that lies back of it, the privilege of independent local opinion and individual conviction, which has given speed, facility, vigor, and certainty to the processes of our economic and political growth. To buy temporary ease and convenience for the performance of a few great tasks of the hour at the expense of that would be to pay too great a price and to cheat all generations for the sake of one."

V.

Taxation may not be imposed, nor the funds thereby raised expended, by the Federal Government for the control of intrastate activities and the benefit of private citizens, as provided in AAA.

The analysis we have made of AAA makes it manifest, without further elaboration, that it imposes taxes for the single purpose of thereby securing funds out of which it may make the rental or benefit payments which the Secretary of Agriculture uses as a consideration to induce producers to make the agreements which he desires on the part of the Federal Government for crop reduction in order thereby to effectuate the declared policy of the Act with respect to agriculture. The taxes are levied only when the Secretary of Agriculture determines to make "rental or benefit payments". They terminate when he decides to discontinue such payments (Sec. 9). For these payments the original Act appropriated "the proceeds derived from the processing taxes" (Sec. 12(b)) while the Amended Act, by Sec. 3, appropriates "a sum equal to the proceeds derived" therefrom.

Thus viewed, in the only light in which the imposi-

tion of these taxes and the use of the funds thereby raised under the terms of AAA can be viewed, the provisions of the Act in that respect are unconstitutional and void, for the two following fundamental reasons:

(1) *They transgress the settled rule that Congress may not constitutionally use its powers to control intrastate affairs.*

We have just seen that Congress may not use its great power for regulating interstate commerce in order thereby to regulate, directly or indirectly, the internal affairs of a State. The reason is, as stated in the authorities we have cited, that so to hold would bring under the regulatory power of Congress each and every internal concern of a State, whereas regulation of such concerns had been intentionally omitted from the enumerated powers conferred on the Federal Government and expressly reserved to the States by the Tenth Amendment.

If it be true that the power to regulate interstate commerce may not be thus used, it logically and inevitably follows, for like reasons, that the other federal powers, including the revenue power, are subject to a like limitation.

Such was the express decision of this Court in the *Child Labor* case (*Bailey* v. *Drexel Furniture Co.*, 259 U. S. at 38-9) where it held void for this reason a Federal Statute which imposed a tax on articles manufactured by child labor in order thereby to prevent such labor in factories. It said:

> "Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted

> with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it."

If Congress cannot thus use the *burden* of taxation as a penalty to regulate intrastate activities, it follows that it cannot thus use the *benefits* of taxation as an inducement to purchase such regulation, for the same power is involved, the same principles control, the same reasons forbid—just another route to same end.

Directly in point is the statement of Chief Justice Marshall in his great opinion in *Gibbons* v. *Ogden* (9 Wheat. at 199) that "Congress is not empowered to tax for those purposes which are within the exclusive province of the States". And in *Linder* v. *United States* (268 U. S. at 17-8) the Court held unconstitutional an Act enacted under the revenue powers, because in reality it constituted an attempted Federal regulation of medical practice. In so doing the Court said:

> "* * * we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced."

To the same effect is *Hill* v. *Wallace* (259 U. S. at 66-8). See also forbidding doing indirectly what cannot be done directly: *Fairbank* v. *United States*, 181 U. S. at 294-7; *National Ins. Co.* v. *United States*, 277 U. S. at 520; *Macallen Co.* v. *Massachusetts*, 279 U. S. at 626-31 which involved taxing powers.

These limitations on the revenue powers, as hereinafter shown, were admitted and accepted even by those who most advocated the Hamilton theory for the welfare clause.

(2) *They transgress the settled rule that private property may not be taken, by taxation or condemnation, for a private use, but only for a public governmental purpose.*

In the leading case of *The Citizens' Savings & Loan Assn.* v. *Topeka* (20 Wall. at 662-7) this Court in an opinion by Mr. Justice Miller held unconstitutional a State Statute authorizing municipal bonds in aid of a manufacturing enterprise because:

> "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprise and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

In so doing he vividly depicted the evils of a contrary conclusion, which the experience we are undergoing fully confirms, saying in this respect:

> "If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

Unquestionably, agriculture is a private enterprise, operated by private citizens for their own personal profit, just like a manufacturing enterprise; and many State decisions have expressly so held. See: *State* v. *Osawkee,* 14 Kan. 418; *Deering & Co.* v. *Peterson,* 75 Minn. 118; *Deal* v. *Mississippi Co.,* 107 Mo. 464; *Michigan Sugar Co.* v. *Auditor General,* 124 Mich. 674.

May the Federal Government so use its powers of taxation and appropriation if the States may not? The question arose, but was not decided, in *Field* v. *Clark,* 143 U. S. at 695; *United States* v. *Gettysburg Co.,* 160 U. S. at 681; *Massachusetts* v. *Mellon,* 262 U. S. at 480; and *United States* v. *Realty Co.,* 163 U. S. at 431-40, which, though claimed to support a contrary view, expressly declared the decision of this question "unnecessary" and placed its decision on the claim of "an equitable, moral or honorary nature" arising from compliance with a bounty act which Congress had rendered abortive by repeal of the act.

However, on principle and authority, we do not see why the doctrine of the *Topeka* case (which was re-affirmed in *Parkersburg* v. *Brown,* 106 U. S. at 501, and *Cole* v. *LaGrange,* 113 U. S. at 6-7) is not as applicable to such Federal taxation and appropriations as to those of a State.

This Court said in the Topeka case that: "The theory of our governments, state and national, is opposed" to such a power (20 Wall. at 662-3).

As respects both subjects and objects, the taxing powers of a State are certainly as broad as those of the United States, and there is no difference whatever in its application to such a situation between the due process clause of the Fifth and of the Fourteenth Amendments (*Heiner* v. *Donnan,* 285 U. S. at 326).

The very terms of the phrase used to denote the purposes for which Federal taxes may be imposed—"to pay the debts and provide for the common defence and general welfare *of the United States*"—by its use of the words "of the United States" clearly confines such purposes to those which may be truly characterized as "of the United States",—the entity created by the Constitution—which correspondingly excludes those "of a State" or "of a citizen". For instance, Congress may not tax in order to pay the "debts" of a State or a citizen, and therefore by parity of reasoning it follows that it may not tax for the "general welfare" of a State or a citizen.

Taking by taxation is not different from taking by eminent domain (*Fall Brook Irrigation Dist.* v. *Bradley,* 164 U. S. at 161; *Cole* v. *City of LaGrange,* 113 U. S. at 6; *Dodge* v. *Mission Township* (C. C. A. 8th, 1901), 107 Fed. at 829). Each for the same reason may be only for a public governmental purpose (*Kohl* v. *United States,* 91 U. S. at 372-3; *United States* v. *Gettysburg Co.,* 160 U. S. at 679).

This Court has often declared that Federal taxation is "a pecuniary burden for the support of the government". See: *United States* v. *B. & O. R. R. Co.,* 17 Wall. at 326; *Hampton* v. *United States,* 276 U. S. at 412; *United States* v. *La Franca,* 282 U. S. at 572; and *Heiner* v. *Donnan,* 285 U. S. at 327.

Judge Cooley was therefore correct as respects both our Federal and State Governments when he said in his Const. Lim. (7th Ed.) at page 507:

> *"But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another for the private use and benefit of*

such other, whether by general law or by special enactment."

In 1887 President Cleveland, himself a distinguished lawyer, vetoed on this ground an Act of Congress to aid drouth-stricken counties in Texas, saying, "I can find no warrant for such an appropriation in the Constitution" and that "the lesson should be constantly enforced that though the people support the Government, the Government should not support the people" (XI M. & P. of Pres. 5142).

In 1895, in *United States ex rel. The Miles Planting & Mfg. Co.* v. *Carlisle* (5 App. Cas. D. C. 138) the Court held unconstitutional on this ground an Act of Congress authorizing the payment of a bounty to sugar producers, its conclusion being:

> "We think the authorities cited above establish beyond question that the power of taxation, in all free governments like ours, is limited to public objects and purposes governmental in their nature. No amount of incidental public good or benefit will render valid taxation, or the appropriation of revenue to be derived therefrom, for a private purpose" (p. 158).

In 1922 Mr. Justice Holmes, whose liberalism and ability none may gainsay, declared in Pennsylvania Coal Co. v. *Mahon* (260 U. S. at 416):

> *"In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."*

In 1925 President Coolidge in his Annual Message

declared that "no right exists to levy on a dollar, or to order the expenditure of a dollar, of the money of the people except for a necessary public purpose duly authorized by the Constitution".

And last May in the Schechter case (295 U. S. at 550) *Chief Justice Hughes said for a unanimous Court*:

> *"Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting 'the cumulative forces making for expanding commercial activity.' Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the Federal Government must be made in a manner consistent with the authority granted by the Constitution."*

VI.

The general welfare clause does not require a contrary conclusion.

This clause furnishes no support whatever for the provisions of AAA for the three following conclusive reasons:

In the first place, it is now settled that the clause does not constitute the grant of an independent power.

In 1833, when Mr. Justice Story published his Commentaries, he said that it had become "the generally received sense of the Nation", which "seems supported by reasoning at once solid and impregnable", that this clause is not an independent power, but *"a qualification of"* the power "to lay and collect taxes, duties, imposts and excises", expressing the purpose of such power, since "the Constitution was, from its very origin, contemplated to be the frame of a national government of special and enumerated

powers, and not of general and unlimited powers", whereas to treat the clause as an independent power would create "a general authority in Congress to pass all laws, which they may deem for the common defence or general welfare" (Secs. 908-9, 5th Ed.).

In the second place, this clause, as an expression of the purpose of the taxing power, does not sustain AAA because it does not authorize the Federal Government to transcend the limits set by the preserved rights and powers of the States and the citizens.

AAA is not a mere appropriation of public funds for a national as distinguished from a local purpose. It goes largely further, as our analysis has shown, and by taking the property of one set of private citizens, to wit, the processors, and bestowing it on another set of private citizens, to wit, the farmers, it induces the latter to enter into agreements which vest in the Federal Government complete control, which under said Act and agreements it is now exercising, of a vast area of intrastate activities, to wit, the growing and processing of crops.

This reach of AAA renders it unconstitutional, without regard to a precise definition of the power under this clause, because it usurps the reserved powers of the States and ignores the preserved rights of the citizens, and thereby impinges upon the most sacred and cherished of our constitutional principles.

This is the clear holding of many decisions of this Court, which we have already cited in our previous discussion. From them we select two by way of illustration because of their extreme pertinency to the two separate issues presented:

In *Kansas* v. *Colorado* (206 U. S. 46) this Court held that the Federal Government did not have power to reclaim arid lands in the States. Pointing out that

the question involved was not navigation, but the "superior right on the part of the National Government to control the whole system of the reclamation of arid lands" and that "that involves the question whether the reclamation of arid lands is one of the powers granted to the National Government", Mr. Justice Brewer, who delivered the opinion of the Court, reviews the provisions of the Constitution and the authorities, and concludes:

> "But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment.
>
> "This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, *under the pressure of a supposed general welfare,* attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act" (pp. 87-90).

In *Savings & Loan Assn.* v. *Topeka* (20 Wall. 655), which has been often followed, this Court enunciated the fundamental principle by reason of which neither

the State nor the National Government may take by taxation the property of one private citizen and bestow it on another, accordingly holding void a State statute which authorized municipal bonds in aid of a manufacturing enterprise. The opinion of Mr. Justice Miller, breathing his indignation at such a trespass, declared the exaction a robbery, though done in the name of taxation, because:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. * * * The theory of our governments, *state and national,* is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name" (pp. 662-3).

In 1798 Mr. Justice Chase enunciated these same principles in *Calder* v. *Bull* (3 Dall. at 388-9) when he said such laws would be "a political heresy altogether inadmissible in our free Republican governments"; and Mr. Justice Roberts reiterated this view when he said that the Railroad Retirement Act "denies due process of law by taking the property of one and bestowing it upon another" (295 U. S. at 350).

Those who have most advocated the larger meaning

for the clause, and on whose opinions most reliance is placed to sustain AAA—Hamilton, Monroe, Jackson and Story—themselves acknowledged the limitations which prevent the reach which AAA has.

Hamilton in his Report on Manufactures of 1791—which originated this enlarged signification (hence its appellation "Hamilton theory")—strictly limited its scope to an appropriation of money only, saying (Works, Lodge Ed. III: 370-2):

> "There seems no room for a doubt, that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, *so far as regards an application of money*";

also that it "must be *general,* and not *local*", and that:

> "A power *to appropriate money* with this latitude, which is granted in express terms, would not carry a power to do any other thing, not authorized in the constitution either expressly, or by fair implication" (italics in original);

thus clearly indicating he regarded the power as one for appropriation only, not for exercise of ungranted powers through means of the appropriation.

Monroe in his paper of May 4th, 1822, entitled "Views of the President of the United States on the subject of Internal Improvements", while stating his belief that the clause gave Congress unlimited discretionary power of appropriation, "restricted only by the duty to appropriate it to purposes of common defence, and of general, not local, national, not state, benefit", though the clause was not the grant of an independent power, nevertheless expressly placed on

this larger meaning the very limitation for which we are here contending, saying:

> "If, then, the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants, according to a strict construction of their powers respectively, is there no limitation to it? Have congress a right to raise and appropriate the money to any, and to every purpose, according to their will and pleasure? They certainly have not. The government of the United States is a limited government, instituted for great national purposes, and for those only. Other interests are committed to the states, whose duty it is to provide for them. Each government should look to the great and essential purposes, for which it was instituted, and confine itself to those purposes" (II M. & P. of the Pres., p. 736).*
>
> "From this view of the right to appropriate and of the practice under it I think that I am authorized to conclude that the right to make internal improvements has not been granted by the power 'to pay the debts and provide for the common defense and general welfare', included in the first of the enumerated powers; that that grant conveys nothing more than a right to appropriate the public money and stands on the same ground with the right to lay and collect taxes, duties, imposts, and excises, conveyed by the first branch of that power; that the Government itself being limited both branches of the power to raise and appropriate the public money are also limited, the extent of the Government as designated by the

* Messages and Papers of the Presidents, prepared under the direction of the Joint Committee on Printing of the House and Senate, pursuant to an Act of the 52nd Congress of the United States, published by Bureau of National Literature, Inc.

specific grants marking the extent of the power in both branches, extending, however, to every object embraced by the fair scope of those grants and not confined to a strict construction of their respective powers, it being safer to aid the purposes of those grants by the appropriation of money than to extend by a forced construction the grant itself; that although the right to appropriate the public money to such improvements affords a resource indispensably necessary to such a scheme, it is, nevertheless, deficient as a power in the great characteristics on which its execution depends" (II M. & P. of Pres., p. 742).

In keeping with these views, on the same day he vetoed an Act of Congress establishing the Cumberland road, with gates and tolls, in a Message which declared:

"It is a complete right of jurisdiction and sovereignty, for all the purposes of internal improvement, *and not merely the right of applying money,* under the power vested in Congress to make appropriations,—under which power, with the consent of the states through which this road passes, the work was originally commenced, and has been so far executed. I am of opinion that Congress do not possess this power; that the states, individually, cannot grant it; for although they may assent to the appropriation of money within their limits for such purposes, they can grant no power of jurisdiction or sovereignty by special compacts with the United States. This power can be granted only by an amendment to the Constitution, and in the mode prescribed by it.

"If the power exist, it must be, either because it has been specifically granted to the United States, or that it is incidental to some

> power which has been specifically granted. If we examine the specific grants of power, we do not find it among them, nor is it incidental to any power which has been specifically granted" (II M. & P. of Pres., pp. 711-2).

Jackson, for the same reason, vetoed on May 27th, 1830, an Act authorizing a subscription of stock in the Maysville Turnpike Road Company (and other similar Acts later). While he considered Acts of the previous administrations, which he reviewed, imposing

> "so far as the mere appropriation of money is concerned" though he regretted their existence, deeming them "an admonitory proof of the force of implication and the necessity of guarding the Constitution, with sleepless vigilance, against the authority of precedents which have not the sanction of its most plainly defined powers",

nevertheless he was of opinion the Act was unconstitutional because:

> "Although frequently and strenuously attempted the power to this extent ['construct or promote works of internal improvement'] has never been exercised by the government in a single instance. It does not in my opinion possess it and no bill, therefore, which admits it, can receive my official sanction."
>
> "*Assuming the right to appropriate money,* to aid in the construction of national works, to be warranted by the contemporaneous and continued exposition of the Constitution, *its insufficiency for the successful prosecution of them must be admitted by all candid minds.* If we look to usage to define the extent of the right, that will be found so variant, and embracing so much that has been overruled, as

to involve the whole subject in great uncertainty; and to render the execution of our respective duties in relation to it replete with difficulty and embarrassment. It is in regard to such works, and the acquisition of additional territory, that the practice obtained its first footing. *In most, if not all, other disputed questions of appropriation, the construction of the Constitution may be regarded as unsettled, if the right to apply money, in the enumerated cases, is placed on the ground of usage"* (III M. & P. of Pres., pp. 1048, 1050, 1053-4).

Story placed the same limitation on the clause not only by his approval of Hamilton's Report and Monroe's "Views" from which he quoted at length (Comm. Secs. 978-90, 5th Ed.), but also expressly in stating his views as to internal improvements. He said:

"Congress may not indeed engage in such undertakings [internal improvements] merely because they are internal improvements for the general welfare unless they fall within the scope of the enumerated powers. The distinction between this power and the power of appropriation is that in the latter Congress may appropriate to any purpose which is for the common defence or general welfare; but in the former they can engage in such undertakings only as are means or incidents to its enumerated powers * * *. The power to regulate commerce cannot include a power to construct roads and canals and improve the navigation of water courses in order to facilitate, promote and secure such commerce without a latitude of construction departing from the ordinary import of the terms and incompatible with the nature of the Constitution" (Story,

5th Ed., Secs. 1274 and 1277, *citing with approval Madison's Message of 3d March 1817, Monroe's Message of 4th May 1822 and Jackson's Message of 27th May 1830*).

This limitation has been steadfastly upheld. See, Veto Messages of Tyler of June 11th, 1844, of Polk of August 3rd, 1846 and December 15th, 1847, and of Pierce of May 3rd and December 30th, 1854 (M. & P. of Pres., pp. 2183-4, 2310-2, 2468-75, 2782-8, 2792), in addition to other Messages and the decisions elsewhere cited. Especially interesting and applicable is the following from Polk's Message of December 15th, 1847:

> "The policy of embarking the Federal Government in a general system of internal improvements had its origin but little more than twenty years ago. In a very few years the applications to Congress for appropriations in furtherance of such objects exceeded two hundred millions of dollars. In this alarming crisis President Jackson refused to approve and sign the Maysville Road Bill, the Wabash River Bill and other bills of similar character. His interposition put a check upon the new policy of throwing the cost of local improvements upon the National Treasury, preserved the revenues of the Nation for their legitimate objects, by which he was enabled to extinguish the then existing public debt and to present to an admiring world the unprecedented spectacle in modern times of a Nation free from debt and advancing to greatness with unequalled strides under a Government which was content to act within its appropriate sphere in protecting the States and individuals in their own chosen career of improvement and of enterprise."

"Such a system is subject, moreover, to be perverted to the accomplishment of the worst of political purposes. During the few years it was in full operation, and which immediately preceded the Veto of President Jackson of the Maysville Road Bill, instances were numerous of public men seeking to gain popular favor by holding out to the people interested in particular localities, the promise of large disbursements of public money. Numerous reconnoissances and surveys were made during that period for roads and canals through many parts of the Union and the people in the vicinity of each were lead to believe that their property would be enhanced in value and they themselves be enriched by the large expenditures which they were promised by the advocates of the system should be made from the Federal Treasury in their neighborhood. Whole sections of the country were thus sought to be influenced and the system was fast becoming one, not only of profuse and wasteful expenditure, but a potent political engine" (M. & P. of Pres. at pp. 2462, 2464).

It thus seems incontrovertible that the reach of AAA totally prevents it from being sustained under the Constitution, not only by reason of the decisions but even on the authority of these advocates of the larger meaning for the general welfare clause, for the reason that these advocates expressly limit the power under this larger meaning to "mere appropriations"—and that for general and national, not local or state, benefit—thus excluding on the one hand control of intrastate activities through the medium of these appropriations and on the other hand the bestowal of one citizen's property on another citizen by taxation.

In the third place, this clause does not authorize an appropriation for the accomplishment of objects not intrusted to the Federal Government.

This is the clear requirement of the basic constitutional principle that the "end" must be "legitimate" and "within the scope of the Constitution", the "means" consistent with its "letter and spirit". Enunciated by Chief Justice Marshall in *McCulloch* v. *Maryland* (4 Wheat. at 421), this principle has become the established test (*United States* v. *Gettysburg Co.*, 160 U. S. at 681), axiomatic, universal (*Fairbank* v. *United States*, 181 U. S. at 287-9; *Kansas* v. *Colorado*, 206 U. S. at 87-91). And it plainly forbids appropriations for ends beyond Federal powers of accomplishment. See the convincing consideration by Hon. John Randolph Tucker in his work on the Constitution (Vol. I, pp. 470-97).

Chief Justice Marshall himself drew this inevitable conclusion when he further said in *McCulloch* v. *Maryland* that: *"Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government,* it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land" (4 Wheat. at 423). And he gave a perfect illustration and authoritative upholding of the precise point we are here making when in *McCulloch* v. *Maryland* he sustained national banking as within the limits of the Constitution and in *Gibbons* v. *Ogden* accorded plenary power under the commerce clause over the commerce it embraces, yet, nevertheless, in the latter case at the same time declared, with entire consistency, that:

> "Congress is not empowered to tax for those purposes, which are within the exclusive province of the States" (9 Wheat. at 199),

which means, of course, that in his opinion a tax may not be levied, and hence no appropriation made, for such extraneous purposes.

This conclusion undoubtedly accords with the intentions of the Conventions which framed and ratified the Constitution and has been that accepted over the years as most conforming to the fundamentals of our Government. The data in this respect has been collected and reviewed in an able and thorough manner by Hon. Henry St. George Tucker in an address published in the American Bar Association Law Journal for July and August, 1927, under the title "Judge Story's Position on the General Welfare Clause". Mr. Tucker shows, with copious references and extracts, that Hamilton's theory "was six times, directly or indirectly, rejected in the Constitutional Convention", that a large majority of the Committee of Eleven which finally reported the clause for incorporation in Sec. 8, Art. I, was strongly opposed to Hamilton's theory, that a more restricted meaning, which makes the clause co-extensive with the granted powers, has been approved by the great preponderance of authority, including a distinguished list of statesmen, judges and authors, given in the footnote,* which he cites in support of his statement.

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* *Chief Justice Marshall*, in *Gibbons* v. *Ogden* (9 Wheat. at 199) and *McCulloch* v. *Maryland* (4 Wheat. at 421, 423); *Mr. Justice Brewer*, in *Kansas* v. *Colorado* (206 U. S. at 87-91) and *Fairbanks* v. *United States* (181 U. S. at 287-9, 294, 300); *Mr. Justice Miller*, in his work on the Constitution (p. 229, notes 2, 247) and *Loan Assn.* v. *Topeka* (20 Wall. at 662-4); *Madison*, in Art. 41 of the Federalist, the Report on the Virginia Resolutions of 1798, his letter to Andrew Stevenson of Nov. 27th, 1830, with the supplement thereto (Writings, Hunt Ed. VI: 356-7; IX: 411-31) and also his Messages of Mar. 3rd, 1817 and May 4th, 1822: *Jefferson*, in his opinion on the *Bank of the United States* of Feb. 15th, 1791, and his letter to Judge Spencer Roane of Oct. 12th, 1815 (Ford Ed. VI: 199; XI: 489-90); *James Wilson*, (Andrews Ed. II: 56-9); *Judge Cooley*, in his work on Taxation (2nd Ed. p. 110) and his Const. Lim. (pp. 11, 106); *John C. Calhoun* (Vol. III: 36, 37, 41); *Hare*, American Constitutional Law (I: 242-3); *Duer*, Constitutional Jurisprudence (2nd Ed. p. 211); Willoughby on the Constitution (I: 40; 2nd Ed. p. 97); *Van Holst*, Constitutional Law of the United States (p. 118): the Message of *President Cleveland* in 1887, vetoing the appropriations for drouth-stricken counties in Texas; and *President Coolidge's* address before the Budget Meeting on Jan. 21st, 1924, and in his Annual Message of Dec. 8th, 1925.

Story himself, though personally favoring the Hamilton theory, verifies these conclusions in a most convincing manner.

His deduction from the history of the clause in the National Convention is that:

> "The truth is, as the historical review also proves, that after it had been decided that a positive power to pay the public debts should be inserted in the Constitution and a desire had been evinced to introduce some restriction upon the power to lay taxes, in order to allay jealousies and suppress alarms, it was (keeping both objects in view) deemed best to append the power to pay the public debts to the power to lay taxes; and then to add other terms, *broad enough to embrace all the other purposes contemplated by the Constitution.* Among these none were more appropriate than the words 'common defense and general welfare' found in the Articles of Confederation and subsequently with marked emphasis introduced into the preamble of the Constitution. *To this course no opposition was made because it satisfied those who wished to provide positively for the public debts and those who wished to have the power of taxation coextensive with all constitutional objects and powers"* (Story's Comm., 5th Ed., Sec. 930).

Thus we have complete confirmation from Story of the fact that this clause was inserted as a power only coextensive with the other powers, in aid of which it was from its very nature, and not as authorization for something entirely beyond them—any more than the use of the terms "common defense" and "general welfare" in the preamble expressed such

a further purpose (*Jacobson* v. *Massachusetts,* 197 U. S. at 22).

But more important still, quoting as follows from Jefferson's opinion on the Bank of the United States in 1791 (Ford Ed. VI: 199):

> "To lay taxes to provide for the general welfare of the United States, is, to lay taxes for the purpose, of providing for the general welfare. For the laying of taxes is the power, and the general welfare the purpose, for which the power is to be exercised. Congress are not to lay taxes *ad libitum,* for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do any thing they please, to provide for the general welfare; but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give that, which will allow some meaning to the other parts of the instrument, and not that, which will render all the others useless. Certainly, no such universal power was meant to be given them. *It was intended to lace them up strictly within the enumerated powers, and those, with-*

> *out which, as means, those powers could not be carried into effect.";* [also letter to Gallatin in 1817, XII: 72]

and further quoting the following statement from the opinion of Chief Justice Marshall in *Gibbons* v. *Ogden* (9 Wheat. at 199):

> "Congress is authorized to lay and collect taxes, &c. to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power, that is granted to the United States. In imposing taxes for state purposes, they are not doing, what Congress is empowered to do. *Congress is not empowered to tax for those purposes, which are within the exclusive province of the states.* When, then, each government is exercising the power of taxation, neither is exercising the power of the other.";

Mr. Justice Story thus comments thereon:

> "The same opinion has been maintained at different and distant times by many eminent statesmen. It was avowed, and apparently acquiesced in, in the stated conventions, called to ratify the constitution; and it has been, on various occasions, adopted by congress, *and may fairly be deemed, that which the deliberate sense of a majority of the nation has at all times supported. This, too, seems to be the construction maintained by the Supreme Court of the United States. * * * Under such circumstances, it is not, perhaps, too much to contend, that it is the truest, the safest, and the most authoritative construction of the constitution.*

> * * * The view thus taken of this clause of the constitution will receive some confirmation, (if it should be thought by any person necessary,) by an historical examination of the proceedings of the convention" (Comm., 5th Ed., Secs. 926-8).

How can these statements of Story be true and at the same time the Hamilton theory be regarded as the proper and accepted meaning of the general welfare clause instead of *this construction of Jefferson and of Marshall which Story thus endorses, and shows to have been thus widely approved, and is the very construction which Madison urged* against Hamilton's view and because of his distinguished support has come to be known as the "Madison theory".*

Madison, in amplification of his Article 41 in the Federalist, and in the light of Hamilton's Report on Manufactures, had thus stated his construction, with the reasons therefor, in his Report on the Virginia Resolutions of 1798:

> "Now, whether the phrases in question be construed to authorize every measure relating to the common defence and general welfare, as contended by some—or every measure only in which there might be an application of money, as suggested by the caution of others—the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follow these general phrases in the Constitution; for it is evident that there is not a single power whatever which

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* Daniel Webster declared that Madison had "as much to do as any man in the framing of the Constitution, and as much as any man in administering it. *Nobody among the living or the dead is more fit to be consulted on a question growing out of it,*" in which sentiment John C. Calhoun concurred; indeed, Madison has been aptly termed, without dissent, "the father of the Constitution" (Warren, "The Making of the Constitution", pp. 57, 794, Note 1).

may not have some reference to the common defence or the general welfare; nor a power of any magnitude, which, in its exercise, does not involve or admit an application of money. The government, therefore, which possesses power in either one or other of these extents, is a government without the limitations formed by a particular enumeration of powers; and, consequently, the meaning and effect of this particular enumeration is destroyed by the exposition given to these general phrases."

"The true and fair construction of this expression, both in the original and existing Federal compacts, appears to the committee too obvious to be mistaken. In both, the Congress is authorized to provide money for the common defence and general welfare. In both, is subjoined to this authority an enumeration of the cases to which their powers shall extend. Money cannot be applied to the general welfare, otherwise than by an application of it to some particular measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with and is enforced by the clause in the Constitution which declares that 'no money shall be drawn from the Treasury, but in consequence of appropriations by law'. An appropriation of money to the general welfare would be deemed rather a mockery than an observance of this constitutional injunction" (Writings, Hunt Ed. VI: 356-7).

Years later, from his retirement, after mature reflection in the light of his great experience, Madison again thoroughly reviewed and discussed this subject in his letter of November 27th, 1830, to Speaker Stevenson and showed himself to be of the same opinion, for the very same reasons (Writings, Hunt's Ed. IX: 411 *et seq.*). He said:

> "That the terms in question were not suspected in the Convention which formed the Constitution of any such meaning as has been constructively applied to them may be pronounced with entire confidence. For it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant & cautious definition of Federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions & definitions elaborated by them.
>
> "Consider for a moment the immeasurable difference between the Constitution limited in its powers to the enumerated objects; and expounded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two Constitutions, of characters essentially contrasted with each other, the the one possessing powers confined to certain specified cases, the other extended to all cases whatsoever; for what is the case that would not be embraced by a general power to raise money, a power to provide for the general welfare, and a power to pass all laws necessary & proper to carry these powers into execution; all such provisions and laws superseding, at the same time, all local laws & constitutions at variance with them. Can less be said, with the evidence before us furnished by the Journal of the Convention itself, than that it is impossible that

> such a Constitution as the latter would have been recommended to the States by all the members of that Body whose names were subscribed to the instrument" (pp. 420-1).

And he finds evidence "if possible, still more irresistible" in support of this understanding and meaning in the fact that neither in the Ratifying Conventions nor in the Session of Congress which initiated the first Ten Amendments was there suggested an amendment with respect to the welfare clause, although if this broad meaning sought to be given that clause had then been asserted those advocating the amendments could not but have regarded it "as giving a scope to Federal legislation infinitely more objectionable than any of the specified powers which produced such strenuous opposition and calls for amendments" (pp. 421-3).

Finally, in a supplement to this letter Madison put the case, logically and historically, in a nutshell thus:

> "3. A power to appropriate money, without a power to apply it in execution of the object of appropriation, could have no effect but to lock it up from public use altogether; and if the appropriating power carries with it the power of application and execution, the distinction vanishes. The power, therefore, means nothing, or what is worse than nothing, or it is the same thing with the sweeping power 'to provide for the common defense and general welfare'.
>
> "The result of this investigation is, that the terms 'common defence and general welfare' owed their induction into the text of the Constitution to their connexion in the 'Articles of Confederation,' from which they were copied, with the debts contracted by the old Con-

gress, and to be provided for by the new Congress; and are used in the one instrument as in the other, as general terms, limited and explained by the particular clauses subjoined to the clause containing them; that in this light they were viewed throughout the recorded proceedings of the Convention which framed the Constitution; that the same was the light in which they were viewed by the State Conventions which ratified the Constitution, as is shown by the records of their proceedings; and that such was the case also in the first Congress under the Constitution, according to the evidence of their journals, when digesting the amendments afterward made to the Constitution. It equally appears that the alleged power to appropriate money to the 'common defence and general welfare' is either a dead letter, or swells into an unlimited power to provide for unlimited purposes, by all the means necessary and proper for those purposes. And it results finally, that if the Constitution does not give to Congress the unqualified power to provide for the common defence and general welfare, the defect cannot be supplied by the consent of the States, unless given in the form prescribed by the Constitution itself for its own amendment." (Writings, Hunt Ed. IX; note, pp. 425, 428-9.)

Polk thus aptly expressed both the cause of the persistence, and the reason for the negation, of the Hamilton theory in his Message of December 15th, 1847:

"How forcibly does the history of this subject illustrate the tendency of power to concentration in the hands of the general government." * * *

> "The power of appropriation is but the consequence of the power to raise money; and the true inquiry is whether Congress has the right to levy taxes for the object over which the power is claimed. * * * When our experience, observation and reflection have convinced us that a legislative precedent is either unwise or unconstitutional it should not be followed. * * * The investigation of this subject has impressed me more strongly than ever with the solemn conviction that the usefulness and permanency of this government and the happiness of the millions over whom it spreads its protection will be best promoted by carefully abstaining from the exercise of all powers not clearly granted by the Constitution" (M. & P. of Pres., pp. 2470, 2471, 2475-6).

Pierce also took Madison's view. On May 3rd, 1854 he vetoed a donation to the States for the indigent insane because for "objects"—"social relations" of education, order, relief—not entrusted to the United States. He said:

> "I cannot find any authority in the Constitution for making the federal government the great almoner of public charities throughout the United States. To do so would in my judgment be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of the States is founded. * * * I have never found anything in the Constitution which is susceptible of such a construction. No one of the enumerated powers touches the subject or has even a remote analogy to it. *The powers conferred upon the United States have reference to federal relations or to the means of accomplishing or executing things of federal relation.* * * * It

> [the welfare clause] is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties and imposts. * * *. All the pursuits of industry, everything which promotes the material or intellectual well-being of the race, every ear of corn or boll of cotton which grows, is national in the same sense, for each one of these things goes to swell the aggregate of national prosperity and happiness of the United States; but it confounds all meaning of language to say that these things are 'national', as equivalent to 'Federal', so as to come within any of the classes of appropriation for which Congress is authorized by the Constitution to legislate. (M. & P. of Pres., pp. 2782-4, 2788; see also his Messages of August 4th and December 30th, 1854, May 19th (2), May 22nd, August 11th and August 14th, 1856, *ibid.* pp. 2789, 2919-21).

Buchanan was of the same opinion. On February 24th, 1859 he vetoed a donation of lands to States for colleges, believing it "undeniable" that Congress could not appropriate federal funds "for the purpose of educating the people" because:

> "Should Congress exercise such a power, this would be to break down the barriers which have been so carefully constructed in the Constitution to separate Federal from State authority. We should then not only 'lay and collect taxes, duties, imposts, and excises' for Federal purposes, but for every State purpose which Congress might deem expedient or useful. This would be an actual consolidation of the Federal and State Governments so far as the great taxing and money power is concerned, and constitute a sort of partnership between the two in the Treasury of the United States.

> equally ruinous to both. * * * *The natural intendment would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers"* (M. & P. of Pres., pp. 3078-9; also his Message of February 1st, 1860, *ibid.* p. 3135).

Likewise were *Cleveland's* Vetoes in 1887 and 1889 of gifts of seeds to drouth-stricken counties and of distribution of tax funds to the several States and Territories (M. & P. of Pres., pp. 5142, 5424), as well as *Coolidge's* Address and Message, already mentioned (pp. 25-6, 38).

Then there are the express decisions in *Miles Planting Co.* v. *Carlisle* (1895), 5 App. Cas. D. C. at page 159, and in *United States* v. *Boyer* (1898), 85 Fed. at 429-32. In the former the Court said:

> "If Congress be conceded power to grant subsidies from the public revenues to all objects it may deem to be for the general welfare, then it follows that this discretion, like all admitted powers of taxation, is absolute. Such a doctrine would destroy the idea that this is a government of 'delegated, limited and enumerated powers', render superfluous all the special delegations of power contained in the Constitution, and open the way for a flood of socialistic legislation, the specious plea for all of which has ever been 'the general welfare'. It is a doctrine that we cannot subscribe to."

It is now the accepted doctrine that the phrase "to provide for the common defence and the general welfare" was intended to be a limitation, not a grant of power.

It no longer has to be argued that the Federal Government is one of enumerated powers.

If Par. 1, Sec. 8, Art. I, had simply said: "The Congress shall have power to lay and collect taxes, duties, imposts and excises", no one would have doubted that the taxing power could be exercised only for the execution of the enumerated powers. Certainly, the power was not conferred to enable the States to execute their reserved powers, much less to enable the Federal Government to usurp those powers.

By what process of reasoning, then, can words of limitation be held to enlarge the power conferred by the words of grant?

The refinement by which Hamilton and his followers seek to answer this query is the assertion that the power is one merely "to appropriate money" and does not require for its exercise any power in the Federal Government to accomplish the ends for which the appropriation is made, which well deserves the blunt remark of Hon. John Randolph Tucker in his work on the Constitution (Vol. I, p. 480): "That a government should have this great means to execute the powers of other governments reaches the point of absurdity."

The power to tax implies the power to appropriate, and that is implicit in the limiting phrase, but if the power to appropriate carries with it the power of application and execution the latter power must be limited to the enumerated powers and those to be implied therefrom or it is destructive of the limitations imposed by them and they become utterly meaningless. If the power of appropriation does not carry with it the power of application and execution it is utterly meaningless, except as it might be made use of, as is now being done, to usurp that power by indirection.

In truth the challenged Act imposes the tax, appropriates the proceeds or a sum equal to the proceeds to an object outside of the federal power and provides for the execution of that object by a federal agency. The tax, the appropriation, the application and execution in a forbidden field are thus inseparably tied together. If such an Act can be sustained the Federal Government ceases to be one of enumerated powers.

Hamilton was unable to persuade the Convention to accept his views of the powers that should be possessed by the central government and after the Constitution was adopted he strove by construction to extend the grant made as much as he could. (1 Tucker on Const., p. 491.)

Curiously, Story accepted Hamilton's theory, although that gave the welfare clause a meaning utterly inconsistent with his reasoning that it did not constitute an independent power because we had formed "a national government of special and enumerated, and not of general and unlimited, powers." (Secs. 908-9). Reconciliation taxed Story beyond even his great talents. He is forced to argue (Sec. 922) that the clause as thus construed is a "limited" or "qualified" power because such things as "propagating Mohametanism among the Turks, or giving aids and subsidies to a foreign nation, to build palaces for its kings, or erect monuments to its heroes" would be "wholly indefensible upon constitutional principles"—yet under his view the will of Congress governs and he cites as precedents (Sec. 991) our aid to Santo Domingo in 1794 and to Venezuela in 1812!!! So his effort at distinction patently fails and there is no limitation on appropriations under the clause unless we adopt that of Madison, Jefferson and Marshall which conforms it to

the Constitution Story said we had when he denied the clause was an independent power.

While this reach of AAA has thus been expressly held unconstitutional by this Court, the question of mere appropriation for objects not entrusted to the Federal Government has been left open by it for future decision with the statement that "it would be difficult to suggest a question of larger importance or one the decision of which would be more far-reaching" (*Field* v. *Clark* (1891), 143 U. S. at 695; *United States* v. *Realty Co.* (1896), 163 U. S. at 433; and *Massachusetts* v. *Mellon* (1923), 262 U. S. at 480).

We feel confident, however, that a denial of such power of appropriation is implicit in the decisions of this Court which we have cited and the constitutional principles they have established; that a contrary conclusion would expand the clause beyond its nature and context and make it a glaring exception, completely undermining the intended scope of our Federal Government.

It seems to us the supremacy of these fundamentals, in a way controlling here, has been illustrated and declared in the recent opinions of this Court in the *Schechter, Rathbun, Frazier-Lemke* and *Railroad Retirement Act* cases. In the latter this Court nullified the Railroad Retirement Act—a like piece of fiscal legislation for the benefit of another class, to wit, railroad employees—and notwithstanding its claimed effect on an instrumentality of interstate commerce. Brushing aside the arguments based on improved morale, general welfare, etc., because of their "failure to distinguish constitutional power from social desirability", Mr. Justice Roberts, for the Court, declared the Act lay "outside the orbit of

Congressional power" and at the same time put his finger squarely on the crucial evil of the unfettered Hamilton theory for appropriations by pointing out that the effect of the Act would be to "transfer the drive for pensions to the halls of Congress and transmute loyalty to employer into gratitude to the Legislature" (295 U. S. at 367, 368, 351).

Nor can such an issue, thus characterized by this Court, and left open for presentation in justiciable form, be regarded as concluded by appropriations Congress may have made for purposes outside the enumerated powers. As expressly held in *Miles P. Co.* v. *Carlisle* (5 App. Cas. D. C. at 161) and amply confirmed by the vetoes and other opinions we have cited and the *Field, Realty Co.* and *Mellon* cases in this Court, such acts have "met with determined opposition and denial of power at all times", so that "it cannot be said they have ever received general consent or acquiescence", although not the subject of adjudication, because the question "is so hard to be raised in an effective manner". See also *U. S.* v. *Boyer,* 85 Fed. at 432. In *Fairbank* v. *United States* (181 U. S. 283) this Court held unconstitutional an act of 1898 taxing foreign bills of lading, although Congress had exerted such power in contemporaneous acts in 1797-1802, in 1823 and in 1862-4, Mr. Justice Brewer saying, what is most pertinent here,

> "it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny", so that "the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution" (p. 312).

The vital import of the question—the true consequence of an affirmation of the power—is now being made manifest in realization of the fears of our forefathers by the experiences of widespread expenditures and unbalanced budgets, with mounting deficits and confidence lost through dread of taxation, inflation, bankruptcy. It is a time when all can unite in the wish so fervently *expressed by Jefferson* in his letter to Judge Spencer Roane in the evening of his life:

> "I hope our courts will never countenance the sweeping pretensions which have been set up under the words 'general defence and public welfare'. These words only express the motives which induced the Convention to give to the ordinary legislature certain specified powers which they enumerate, and which they thought might be trusted to the ordinary legislature, and not to give them the unspecified also; or why any specification? They could not be so awkward in language as to mean, as we say, 'all and some'. And should this construction prevail, all limits to the Federal Government are done away. This opinion, formed on the first rise of the question, I have never seen reason to change, whether in or out of power; but, on the contrary, find it strengthened and confirmed by five and twenty years of additional reflection and experience; and any countenance given to it by any regular organ of the government, I should consider more ominous than anything which has yet occurred" (Ford Ed. XI: 489-90).

Still later *Jefferson* wrote Gallatin "our tenet ever was" that:

> "Congress had not unlimited powers to provide for the general welfare but were re-

> strained to those specifically enumerated; and that as it was never meant they should provide for that welfare but by the exercise of the enumerated powers, so it could not have been meant they should raise money for purposes which the enumeration did not place under their action; consequently that the specification of powers is a limitation of the purposes for which they may raise money" (Ford Ed. XII: 72).

At bottom the issue is the very same that confronted the National Convention and was answered by a government of enumerated powers; that arose in the Ratifying Conventions and was answered by the first Ten Amendments; that arose in this Court and was answered by the historic opinions of Chief Justice Marshall in *Marbury* v. *Madison, McCulloch* v. *Maryland* and *Gibbons* v. *Ogden;* that arose in our Civil War period and was answered by *Ex parte Milligan;* and that has now arisen in our acute depression and been again likewise answered by the statement of Chief Justice Hughes in the *Schechter* case that "the recuperative efforts of the Federal Government must be made in a manner consistent with the authority granted by the Constitution".

VII.

The provisions of AAA are plainly unconstitutional delegations of legislative power by Congress.

So recently and fully has this Court considered this question in *Panama Refining Co.* v. *Ryan* and *Schechter* v. *United States* that a reference to those cases is all that is needed upon the law of the subject.

A comparison of the provisions of AAA with the provisions of NRA, which this Court in those cases

held to be such delegation of legislative power, cannot but bring a like conclusion in the instant case. The powers vested by AAA in the Secretary of Agriculture correspond entirely with the powers vested by NRA in the President and bring this case squarely under the declaration of Chief Justice Hughes in the *Schechter* case:

> "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry" (295 U. S. at 537-8).

In the first place, the Secretary has the same mandate for rehabilitating agriculture that the President had for rehabilitating industry. In his hands is placed the accomplishment of "the declared policy" of the Act, namely:

> "To establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefor, as will re-establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period"—August 1919—July 1929 for tobacco and August 1909—July 1914 for other agricultural commodities (Sec. 2).

This is nothing less than a substitution of the powers conferred on the Secretary for the laws of supply and demand—a discretionary control whereby it was hoped he might succeed where it was thought those laws had failed. The scope is just that broad—the standard just that indefinite.

In the second place, there is just as broad a grant to the Secretary of the means of accomplishing this declared policy. He is authorized:

> "(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments" (Sec. 8).

In these few but potent words agriculture as represented by our basic commodities—its growth and marketing with all that means as to quantity and price—are handed over absolutely to the Secretary's control, regardless of the terms of the Constitution and of the rights of the citizens and the States.

In the third place, there is the like broad discretionary delegation to the Secretary of two other distinct powers, to wit, (1) the imposition of taxes and (2) the appropriation of the revenues therefrom, each of which is expressly a legislative power of Congress under Sec. 8, Art. I, of the Constitution.

The discretion of the Secretary of Agriculture with respect to taxation is shown in a detailed analysis annexed as Appendix A. Suffice it here to say that the taxes begin "when the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity" and "terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be dis-

continued with respect to such commodity" Sec. 9(a).

The whole proceeds of these taxes are allocated to "administrative expenses, rental and benefits payments, and refunds of taxes". Sec. 12(b). And these "rental or benefit payments" as to every single element—time, amount, place, commodity, person—are left utterly to the discretion of the Secretary by the extraordinary power given in Sec. 8 as to crop reduction that we have just noted.

While there is a general standard for the rate in Sec. 9(b), other provisions make this entirely subservient to the discretion of the Secretary for effectuating the declared policy of the Act. The dominant provision in this respect is that of Sec. 9(a) that:

> "Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements."

Art. 6 of U. S. Treasury Dept., Reg. 81, provides that:

> "The rate of processing tax with respect to any commodity will be determined by the Secretary of Agriculture and thereafter the rate of tax will be announced by the Commissioner of Internal Revenue. The rate of processing tax with respect to any particular commodity may be adjusted at intervals by the Secretary of Agriculture, that is, increased or decreased. Any such change of rate, and the day upon which such changed rate takes effect, will be announced by the Commissioner of Internal Revenue."

And *Vogt* v. *Rothensies,* 11 Fed. Supp. 229-30, plainly shows that the Secretary has asserted this right, even to maintaining a tax at a rate above the general standard of Sec. 9(b).

In addition, the Secretary may from time to time, as his discretion dictates, suspend the tax or cause its refund, exempt processors from it, and exclude from its operation any basic agricultural commodity, or any classification, type or grade thereof, as well as vary it as he may think will effectuate the declared policy of the Act. See Secs. 9(b), 11, 15(a), 15(b).

The truth of the foregoing is amply demonstrated by a consideration of any of our basic industries. It has been shown in detail as respects the tobacco industry in a booklet entitled "Tobacco Under The AAA", prepared by Mr. Harold B. Rowe and published by The Brookings Institution.

Leaf tobacco, like other agricultural commodities, has various classifications (as for example our own Bright, Burley, Maryland, Air-Cured, Fire-Cured, Flue-Cured, Cigar, while some are imported, as Turkish, Havana, Sumatra), each of which has many types or grades, with their different volumes and values, due to conditions of soil and climate, the manner of harvesting and curing, and the products in which utilized, so that even the leaves of tobacco on the same plant have each their different use and worth.

And, of course, price and popularity of the article produced greatly affect leaf value. More may be paid for such raw material for a 10¢ than for a 5¢ article. Cigarettes are vastly more in vogue than smoking tobacco, and it in turn exceeds cigars and chewing, which are decadent.

Accordingly the tobacco program thus accurately described at pages 88-90 of the above-mentioned pub-

lication gives an instructive picture of the operations under AAA:

> "The tobacco program as a whole is made up of several distinct plans which are being applied to the different kinds of tobacco. Under the authority provided by Section 11 of the Adjustment Act to treat separately 'any regional or market classification, type, or grade * * *,' the Secretary of Agriculture designated cigar-leaf, flue-cured, Burley, Maryland, dark air-cured, and fire-cured tobaccos each as a basic commodity. For each commodity a separate plan has been developed. Furthermore, the plan for cigar tobacco provides for some variation in procedure with respect to certain types and producing areas.
>
> "When these plans are considered collectively, it becomes apparent that a combination of methods for limiting production constitutes the central element in each plan and in the program as a whole. Other devices have been used, however, including marketing agreements, licenses, and codes. These devices have been co-ordinated with the production approach and used to supplement it to various degrees in the plans for the several commodities. The result has been the evolution of a tobacco program which represents something more than a choice from among those general plans contemplated by the framers of the act. The several devices authorized by the Agricultural Adjustment Act have been combined with the use of powers conferred by the Kerr-Smith Act. Thus a scheme of operation has been developed, the details of which are adapted to differences in the problem as interpreted for the several kinds of tobacco and to the varying conditions encountered in the respective producing areas.

"Three general methods, which constitute the dominant feature of the program as a whole, are being used to effect the limitation of production. The first is the reduction of production through voluntary contracts with growers, as authorized by the Adjustment Act. Basically, these contracts bind producers who participate in the plans to restrict production in return for cash payments out of the funds obtained from processing taxes. This is accomplished by three steps:

"1. Establishing a base from which reductions are to be made. In the first plan only an acreage base was determined, but in the plans subsequently developed for other types both a 'base tobacco acreage' and a 'base tobacco production' were established for each contract signer.

"2. Specifying the reduction required. Typically, this is accomplished by designating a percentage of the base acreage to be kept out of production. The remaining percentage upon which the producer is allowed to grow tobacco constitutes the 'tobacco acreage allotment'. The same percentage of the base production constitutes the 'production allotment' assigned to the grower. It represents the quantity of tobacco he is authorized to produce for market. The cigar plan represents an exception in that only acreage reductions and allotments were specified.

"3. Designating the payments to be made in return for the reduction required.

"The second method for limiting production is the assignment of allotments, representing the quantities which can be marketed, under the terms of a marketing agreement and parallel

license. As will be noted later, this method has been used only for cigar-wrapper tobacco grown in one area and really constitutes an exception in the program as a whole.

"The third and final method is provided by the Kerr-Smith Act. Under the provisions of this act the equivalent of a relatively heavy tax is placed upon most sales of tobacco not covered by allotments assigned under the voluntary contracts to reduce production. This is accomplished by levying the tax upon all sales of types to which the tax is applicable and then issuing tax-payment warrants to producers who have allotments. Such warrants are accepted by the Bureau of Internal Revenue as payment of the tax on the amounts of tobacco covered by allotments. In this manner a tax is collected upon the production of such types by growers who do not sign voluntary contracts, excepting that provision is made for issuance of a limited quantity of additional warrants to producers not eligible to sign contracts and receive benefit payments."

Added to the foregoing are the further facts (1) that every tobacco product is a blend of different types of leaf tobacco, each of which has its own rate of taxation, and (2) that prices of leaf tobacco, as well as prices of the things that farmers buy vary during the year so that parity is constantly changing. See discussion in "Tobacco Under The AAA" at pages 182 *et seq.*

The result has been great differences in the essential terms of the tobacco crop reduction contracts, a summary of which may be found in Appendix D to the above-mentioned work. The rates of taxation have also varied greatly among themselves and from the

general standard prescribed by Sec. 9(b). Prior to the Amendments of 1935, as tabulated by Prentice-Hall, Federal Tax Service, Vol. IV, Par. 34,703.2, they were mainly as follows:—

Market Classification of Tobacco	Effective Date	Rates of Tax per Pound Unsweated Farm Sales Weight	Applicable to: Stem Not Removed Sweated	Stem Removed Sweated
CIGAR-LEAF of any kind except that classified in U. S. Department of Agriculture B. A. E., Service and Regulatory Announcements No. 118 as fire-cured tobacco, used in the manufacture of cigars or small cigars	Oct. 1, 1933	$0.03	$0.0375	$0.05
CIGAR-LEAF of the kind classified in U. S. Department of Agriculture, B. A. E., Service and Regulatory Announcements No. 118 as fire-cured tobacco, used in the manufacture of cigars or small cigars	Feb. 1, 1935	.03	.0325	.043
CIGAR-LEAF of any kind used in the manufacture of scrap chewing or smoking tobacco	Feb. 1, 1935	.02	.025	.033
MARYLAND	Oct. 1, 1934	.00	.00	.00
BURLEY				
Used in manufacture of:				
Chewing tobacco	Feb. 1, 1935	.025	.029	.039
Other articles*	Oct. 1, 1934	.061	.07	.095
FLUE-CURED			In Processing Order	
Used in manufacture of:				
Chewing tobacco	Feb. 1, 1935	.02	.023	.029
Other articles*	Oct. 1, 1933	.042	.047	.061
FIRE-CURED				
Used in manufacture of:				
Chewing tobacco	Feb. 1, 1935	.02	.022	.029
Other articles*	Oct. 1, 1933	.029	.032	.041
DARK AIR-CURED				
Used in manufacture of:				
Chewing tobacco	Feb. 1, 1935	.02	.023	031.
Other articles*	Oct. 1, 1933	.033	.038	.051

* Except cigars and scrap chewing or smoking tobacco.

VIII.

The unconstitutionality of AAA is not cured by the attempted blanket ratifications by the 1935 Amendments.

By Subdivs. (b) and (c) of Sec. 21, added by Sec. 30 of the 1935 Amendments, and set forth in Appendix B, Congress has attempted to cure, for the antecedent period, the blanket delegations of power to the Secretary of Agriculture by blanket ratifications, couched in the most general and indefinite terms, of all that he had theretofore done under the supposed authority of AAA.

This endeavor fails of its purpose, for the following distinct and conclusive reasons:

In the first place, it goes without saying that Congress cannot ratify what it could not authorize as an original proposition. This is necessarily so, and will be found expressly stated as a limitation in all the cases we hereinafter cite. It follows that if AAA be unconstitutional, because (1) of usurpation of the powers reserved to the States with respect to their intrastate affairs or (2) of taking by so-called taxation the property of one set of private citizens and bestowing it on another set of private citizens contrary to the preserved rights of the people, then the authorization was unconstitutional and the ratification cannot bring it within the terms of the Constitution.

In the second place, such ratification, in so far as the taxation is concerned, violates the general rule that "ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act" (*Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. at 339). The reason

is that such ratification is the creation of a liability, not with respect to a pre-existing one. Here the tax is upon the act of processing, by the express mandate of Sec. 9(a); and a tax upon that act, such as here imposed (*Liggett & M. Co.* v. *United States* (C. C. A. 3rd), 77 F. (2d) at 67; *Cornell* v. *Coyne,* 192 U. S. 418), is just as much, and for the same reason, beyond retroactive imposition as is a tax upon the act of making a gift (*Untermeyer* v. *Anderson,* 276 U. S. at 445). Accordingly, the cases which hold that taxes may be assessed for improvements that have been made and paid for, or for one year measured by the income of the previous year, or during a current year on the income of its portion that has elapsed (such as *Wagner* v. *Baltimore,* 239 U. S. at 216-7, and *Stockdale* v. *Insurance Co.,* 20 Wall. at 331-3) are not in point, but must be distinguished, as they were with respect to a retroactive tax on the making of gifts.

In the third place, the ratification is totally beyond the scope accorded by the decisions to legalization by ratification.

In making this statement we are not unaware of the *Philippine Islands* cases (*United States* v. *Heinszen,* 206 U. S. at 370; *Tiaco* v. *Forbes,* 228 U. S. 549; *Rafferty* v. *Smith,* 257 U. S. 226; to which may be added *Springer* v. *Philippine Islands,* 277 U. S. 189), on which counsel for the Government so strongly rely. They are totally inapplicable because, as pointed out in those cases, (1) neither the Constitution nor the Bill of Rights of the Philippine Islands imposes such a principle for its internal affairs (*Tiaco* v. *Forbes,* 228 U. S. 549) and (2) Congress may delegate legislative power to the Executive Department or its representative as respects acquired possessions such as these islands (*Dorr* v. *United States,* 195

U. S. 138). This was the express conclusion, and reason, given in the *Heinszen* case, the Court there saying, what is most pertinent here:

> "Whilst it is admitted that Congress had the power to levy tariff duties on goods coming into the United States from the Philippine Islands or coming into such islands from the United States after the ratification of the treaty, it is yet urged that, as that body was without authority to delegate to the President the legislative power of prescribing a tariff of duties, it hence could not, by ratification, make valid the exercise by the President of a legislative authority which could not have been delegated to him in the first instance. But the premise upon which this proposition rests presupposes, that Congress, in dealing with the Philippine Islands, may not, growing out of the relation of those islands to the United States, delegate legislative authority to such agencies as it may select,—a proposition which is not now open for discussion. *Dorr* v. *United States,* 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808" (206 U. S. at 384-5).

The true nature and scope of ratification, showing the ratification here attempted to be totally beyond its purview, is that declared by Chief Justice Hughes for the Court in *Graham* v. *Goodcell* (282 U. S. at pp. 426-30).

The Act assailed as void for retroactivity was sustained on the express ground that:

> "This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached. There is no question here as to the original liability of the taxpayers. The tax was a valid one, and the fact that the taxpayers

> had been indebted to the government for the amount which was subsequently collected is not now open to dispute" (p. 426).

He then reviews the cases, and concludes:

> "It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice",

approving in this connection the statement in *Charlotte etc. Co.* v. *Wells* (260 U. S. at 11-2) that:

> "The power is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration",

saying: "This principle covers the present case" (pp. 429-30).

Surely, these ratifications are typical cases of what Chief Justice Hughes described in the above quotations as "a bare attempt of the legislature retroactively to create liabilities". If the delegations to the Secretary were unconstitutional they created no liability whatever.

In the fourth place; the principle here involved, and "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution" (*Field* v. *Clark,* 143 U. S. at 692) cannot be maintained if omnibus delegations to the Executive Department may be validated by omnibus ratifications.

The reason is plain, and fully exemplified in the situation here presented, and it is for this reason that we have deemed it necessary to set forth in our analysis of AAA not only the provisions of that Act as heretofore existing, but as they exist under the 1935 Amendments, in order that the Court may thoroughly understand exactly what it would sanction should it uphold the ratifications.

For these provisions show the following important sequence and consequence: (1) An omnibus delegation of legislative power to the Secretary of Agriculture, (2) followed at a succeeding Congress by an omnibus ratification of all he may have done thereunder, (3) *accompanied by a like omnibus delegation of legislative power to the Secretary for the indefinite future,* (4) *with, of course, the prospect, if the ratification be sustained by this Court, of future ratifications accompanied by future delegations from subsequent sessions of Congress.*

Only a moment's consideration will suffice to show that if this *mode of legislation* be sustained then the principle that legislative power may not be delegated has thereby been nullified. Under such a system Congress need not hereafter pass laws which definitely define and impose taxes; all Congress would have to do is to declare as a matter of policy that the budget of the nation should be kept balanced, with broad power to the Secretary of the Treasury to impose taxes of such kinds, at such rates, and with respect to such persons, acts and things, as he may from time to time determine is necessary for that purpose, with Congress at recurring sessions ratifying what he may have levied and collected under this delegation. Similarly, since there would thus be ratified the creation by the Secretary of legal duties on the part of growers and processors, non-observance of which constituted a criminal offense, Congress

need not pass laws defining crimes and imposing punishments therefor; all it need do is to declare criminal acts against the policy of the country, delegate broad power to the Attorney General, by proclamation from time to time to determine what shall constitute crimes and what punishments shall be imposed therefor, with recurring ratifications of the acts of the Attorney General at succeeding sessions of Congress.

Manifestly, such a *mode of legislation* is mere circumvention, which would make a travesty of the constitutional principle involved, and runs squarely counter to the well established doctrine, required for the preservation of the rights and powers reserved from the Constitution, and illustrated by many decisions in this Court, some of which we have already cited (*ante* pp. 16-8, 20-1), so well expressed by Mr. Justice Brewer in *Fairbanks* v. *United States* (181 U. S. at 294), when he said:

> "In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. But that principle is not dependent alone upon the case cited [*Woodruff* v. *Parham,* 8 Wall. 123]. It was recognized long anterior thereto, in *Brown* v. *Maryland,* 12 Wheat. 419."

Of course, this *mode of legislation* will hereafter obtain if such ratifications be upheld. Congress plainly indicated this intention when it accompanied the ratifications with a renewal of the delegations. It further evidenced this intention by the inclusion, as a component part of this scheme of legislation, of another provision of said Sec. 21 (also set forth in Appendix B) which would likewise circumvent for

this purpose another important constitutional principle, to wit, due process of law.

We refer to Sec. 21(d)(1), which provides that "no recovery, recoupment, set-off, refund or credit" shall be allowed on account of "any amount of any tax, penalty or interest, which accrued before, on or after the date of the adoption of this amendment" unless, after a claim for refund has been filed, (1) it shall be established "to the satisfaction of the Commissioner", in addition to other facts, that "neither the claimant nor any person directly or indirectly under his control or having control over him has directly or indirectly included such amount in the price of the article * * * or passed on any part of such amount to the vendee or to any other person in any manner * * * and that the price paid by the claimant or such person was not reduced by any part of such amount" and (2) the Commissioner, after a hearing before him, shall so "find and declare" in a record which by him "shall be duly certified and filed as the record in the case and shall be so considered by the Court".

To understand this section certain essentials must be borne in mind. Sec. 9(a) levies the tax "upon the first domestic processing of the commodity", it is therefore a tax on manufacturing, which enters into the cost of the article and is collected from, passed on to, the purchaser by the simple act of selling (*Lash's Products Co.* v. *United States,* 278 U. S. at 176). Sec. 9(a) further provides that the tax "shall be paid by the processor" and there is no provision whereby the vendee may recover the tax for himself or the processor may recover it for him, so that whatever of the tax the processor may not be able to recover for himself under the terms of this section must remain in the Treasury of the United States,

though unconstitutionally collected and notwithstanding this Court in *Bull* v. *United States* (295 U. S. at 260-1), has authoritatively declared that the retention by the United States of taxes wrongfully collected is "against morality and conscience * * * and amounts in law to a fraud on the taxpayer's rights". See, also, *Moore Ice Cream Co.* v. *Rose,* 289 U. S. at 378-9, and *United States* v. *Emery,* 237 U. S. at 32.

Viewed in the light of these essentials, the section plainly has as its object circumvention of the due process clause, through two important means, as a component part of this scheme of legislation, for the purpose of allowing the United States to get and keep as much revenue by unconstitutional exactions under AAA as possible. The first of these means is the total prevention of recovery by anyone of any amount of the tax, though unconstitutionally exacted, if the processor has included the tax in the price of his article or passed on any part of the tax in any manner to his vendee—this is the plain language, and it has been so construed in the Bulletin thereon of the Agricultural Adjustment Administration, as well as by various District Courts (as will appear from extracts therefrom given in Appendix B). The second of these means is the requirement that the Court record shall be that certified by the Commissioner, so as to confine the taxpayer to a Court review of a record made by a political appointee, instead of the taxpayer having that complete judicial re-examination heretofore afforded him (*United States* v. *Jefferson Co.,* 291 U. S. at 397-9). The Conference Report on the Act (see extract in Appendix B) expressly says that this provision was included so that "no trial *de novo* on the facts by the Court" might be had, "nor can judicial proceedings be brought in the absence of the prior administrative hearing and the record".

The curious theory on which these novel and drastic limitations are sought to be sustained is that: "The constitutional basis for such a provision is found in the power of the United States at any time to assert its sovereign right not to be sued and the power of Congress to determine the jurisdiction of the Courts" (pp. 22-3 of the Senate Report and 23 of the House Report, accompanying the Bill). This is a complete misconception and misstatement of the constitutional rights of the taxpayer. It entirely overlooks the limitations upon the sovereignty of the United States imposed by the first Ten Amendments, one of which is that no person shall be deprived of life, liberty or property without due process of law. The remedy may be changed, but it must preserve the essential elements of due process of law, because the United States cannot, any more than a State, and for the same reason, "make anything due process of law which by its own legislation it chooses to declare such" (*Davidson* v. *Board of Administrators,* 96 U. S. at 102).

The opportunity thus afforded the taxpayer for the unrestricted ascertainment and determination of his rights as respects taxation is not a *privilege* which the United States can circumscribe or withhold at its pleasure; it is the requirement of the terms of the Fifth Amendment, which are a limitation upon the sovereignty of the United States (*Graham* v. *Goodcell,* 282 U. S. at 430-1; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. at 679-80; *Ettor* v. *Tacoma,* 228 U. S. at 155-6; and *Worthen Co.* v. *Kavanagh,* 295 U. S. at 60).

Only by reason of the fact that the system of tax collection, consisting of payment and claim for refund, accorded full opportunity for the ultimate judicial determination of the liability in a manner whereby

the form of the procedure in no way minimized or negatived the rights of the taxpayer, so that he thereby had his "full day in court" *to the same extent as if he were defending an action by the United States to recover the tax,* has this system of procedure been upheld under the limitations of the Fifth Amendment (*Phillips* v. *Commissioner,* 283 U. S. at 595-9; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. at 721-5; *Bull* v. *United States,* 295 U. S. at 259-61).

Sec. 424 of the Revenue Act of 1928 was held in *United States* v. *Jefferson Co.* (291 U. S. at 401-2) not to be a violation of the Fifth Amendment only because it squared with this broad constitutional privilege, by allowing a complete recovery of the tax from the United States, with the simple requirement "that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax and therefore is entitled in justice and good conscience to such relief", which the section did by allowing the claimant to recover not only for himself to the extent he had absorbed or refunded the tax, but also the residue for the benefit of his vendee by giving bond for such refunding.

This Court has jealously safeguarded this right of due process of law so that a taxpayer might not be in any wise deprived of his full day in Court with respect thereto. Illustrations are also furnished by the decisions of this Court which involve rates of public utilities (*Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. at 227-8; *State Corporation Comm.* v. *Wichita Gas Co.,* 290 U. S. at 569), as well as by its decisions with respect to such administrative tribunals as the Federal Trade Commission and the Board of Tax Appeals (*Fed. Trade Comm.* v. *Curtis Pub. Co.,* 260 U. S. at 580; *Fed. Trade Comm.* v. *Eastman Co.,* 274

U. S. at 619; and *Helvering* v. *Taylor*, 293 U. S. 515-6).

Thus we see, with a clearness that is unmistakable, the nature of the mode of legislation being attempted through AAA and that the effect of its sanction will be to nullify the great constitutional principles we here invoke.

CONCLUSION.

It is submitted that the AAA is unconstitutional, for the fundamental reasons we have urged; that these reasons go to the very foundation of the Act as it formerly existed and as it now exists after the Amendments of August 24th, 1935; that on account thereof the whole Act should be held totally beyond the powers of Congress and void, with further making of agreements and collection of taxes thereunder barred and all taxes previously collected thereunder refunded with interest.

Respectfully,

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APPENDIX A.

[illegible] U. S. at 495; and Helvering v. Davis, 301 U. S. 619, 640).

Thus we are faced with a dual necessity in that the entire scheme of legislation being attacked through A.A.A. and that the effect of the decision is to nullify the great governmental principles here involved.

CONCLUSION.

It is submitted that the A.A.A. is unconstitutional for the fundamental reasons we have urged; that those reasons go to the very foundation of the act as it formerly existed and as it now exists after the Amendments of August 24th, 1935, that on account thereof the whole Act should be held totally beyond the powers of Congress and void, with further matters of assessments and collection of taxes thereunder barred and all taxes previously collected thereunder refunded with interest.

Respectfully,

[illegible]
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APPENDIX A.

DISCRETION OF SECRETARY OF AGRICULTURE AS TO TAXATION UNDER AAA.

Now, as heretofore, under Sec. 9(a), as amended by Sec. 11 of the 1935 Amendments, when the Secretary of Agriculture "determines that rental or benefit payments are to be made with respect to any basic agricultural commodity" and proclaims such determination,

> "a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation"

and

> "the processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity".

Now, as heretofore, under Sec. 9(a), as amended by Sec. 11 of the 1935 Amendments, the tax is an excise tax "upon the first domestic processing of the commodity" and "shall be paid by the processor".

Now, as heretofore, the Secretary of Agriculture has unlimited discretion, when in his opinion necessary to effectuate the policy of the Act, to exclude any agricultural commodity, or any classifications, type or grade thereof, from the operation of the tax (Sec. 11, as amended by Sec. 61 of the 1935 Amendments), to suspend the tax or cause a refund thereof (Sec. 15(a), as amended by Sec. 21 of the 1935 Amendments), and to exempt processors from the tax (Sec. 15(b), as amended by Sec. 8 of the 1935 Amendments).

There is a general standard for determination of the rate. It is, as heretofore,

> "the difference between the current average farm

price for the commodity and the fair exchange value of the commodity",

with the following addition, added by the 1935 Amendments:

"plus such percentage of such difference, not to exceed 20 per centum, as the Secretary of Agriculture may determine will result in the collection, in any marketing year with respect to which such rate of tax may be in effect pursuant to the provisions of this title, of an amount of tax equal to (A) the amount of credits or refunds which he estimates will be allowed or made during such period pursuant to section 15(c) with respect to the commodity and (B) the amount of tax which he estimates would have been collected during such period upon all processings of such commodity which are exempt from tax by reason of the fact that such processings are done by or for a State, or a political subdivision or an institution thereof, had such processings been subject to tax" (Sec. 9(b)(1) as amended by Sec. 12).

And the terms used in this standard are defined just as before, namely:

"The fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power with respect to articles farmers buy as such commodity had during the base period specified in section 2 * * * and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture",

with the following inserted by the 1935 Amendments in lieu of the asterisks we have used showing an omission:

"and, in the case of all commodities where the base period is the pre-war period, August 1909 to July

1914, will also reflect interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during said base period" (Sec. 9(c) as amended by Sec. 13).

But the rate of the tax is still in reality what the Secretary, in his discretion, deems proper to effectuate the declared policy of the Act, notwithstanding the medley of provisions added to Sec. 9(b) by Sec. 12 of the 1935 Amendments (as changed by the Joint Resolution) on the subject, namely: Pars. (2), (3), (4) and (5) of Sec. 9(b) and Par. (6) of Sec. 9(b), with its seven Subdivisions,—(A), (B), (C), (D), (E), (F) and (G). This will be plain from the subjoined analysis if we but bear in mind the difference between a rate fixed "pursuant to Par. (6)" of Sec. 9(b) and a rate fixed "in accordance with the formulae, standards and requirements prescribed in this title", which are a great deal broader than the provisions of Par. (6) and bring into play the wide discretionary powers which other parts of the Act have heretofore, and still do, confer on the Secretary for this purpose:

First: Specific rates are imposed by the said Pars. (2), (3), (4) and (5) of Sec. 9(b), as follows: By (2), on wheat, cotton, field corn, hogs, peanuts, tobacco, paper, jute, and (in some instances) sugarcane and sugar beets, the rate in force when the Amendments take effect during the period from such date to December 31st, 1937; by (3), 1¢ per pound of rough rice for the period April 1st, 1935 to July 31st, 1936; by (4), for the period September 1st, 1935 to December 31st, 1937, 30¢ per bushel of rye; and by (5), 25¢ per bushel of barley from the date when the tax takes effect to December 31st, 1937;

Second: By Subdiv. (B) of said Par. (6) of Sec. 9(b) the rates thus fixed by said Pars. (2), (3), (4) and (5), as well as any established under (A) set forth under Third, may be adjusted on a percentage basis of the fair exchange value of the commodity, if and when the aver-

age farm price of the commodity is equal to, or exceeds by a named per centum, such fair exchange value thereof—which brings in the uncertain, indefinite element of ascertaining average farm price and fair exchange value;

Third: Any rate fixed or adjusted by or in accordance with the provisions mentioned in First or Second above, as well as any rate established under Subdiv. (A) of Par. (6) of Sec. 9(b), under the terms of said Subdiv. (A) "shall be *decreased* (including a decrease to zero) in accordance with the formulae, standards and requirements of paragraph (1)" of Sec. 9(b), and the rate "shall thereafter be *increased* in accordance with the provisions of paragraph (1)" of Sec. 9(b), "but subject to the provisions of subdivision (B) of paragraph (6)", which we have stated in Second above. The reference to Par. (1) of Sec. 9(b) includes not simply the general standard therein stated, but also the provision thereof that if the Secretary finds the processing tax is causing an accumulation of surplus stocks or depressing farm prices he may lower the rate or rates of such tax and thereafter increase the rate of such tax to a point that will not cause such accumulation or depression, but not to a rate "higher than the rate provided in the first sentence" of Par. (1) of Sec. 9(b), namely, that authorized by the general standard;

Fourth: By Subdiv. (C) of Par. (6) of Sec. 9(b), any rate "adjusted pursuant to this paragraph (6) shall remain at such adjusted rate, unless further adjusted or terminated *pursuant to this paragraph (6)*, until December 31st, 1937, or until July 31st, 1936 in the case of rice";

But one of the provisions of said Par. (6) is Subdiv. (D), which provides that:

> "In accordance with the formulae, standards and requirements *prescribed in this title*, any rate of tax prescribed in paragraphs (2), (3), (4) or (5) of this subsection, or which is established pursuant to this paragraph (6), *shall be increased.*"

Accordingly, we find that by Subdiv. (A) of Par. (6) of Sec. 9(b) any rate may be *reduced* to zero, if the Secretary thinks that necessary to prevent such accumulation or depression, so there is no definite standard in that direction for the discretion of the Secretary.

And when we turn to the "formulae, standards and requirements prescribed in this title" to see what *increases* are authorized by Subdiv. (D) of Par. (6), which we have just quoted, we find in Sec. 9(a), that "such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements", so there is no definite standard for the discretion of the Secretary in that direction.

True, Sec. 9(a) also says "the rate of tax shall conform to the requirements of subsection (b)". But one of the requirements of said Subsec. (b) is Subdiv. (D) of Par. (6) which we have seen authorizes an increase "in accordance with the formulae, standards and requirements *of this title*"—which includes, and thereby we get back again to, the discretion vested in the Secretary of Agriculture by Sec. 9(a) to adjust the rate to the requirements he thinks will effectuate the declared policy of the Act. Otherwise these adjacent sentences in Sec. 9(a) are mere repetition.

The above conclusion not only results from the plain language of the provisions to which we have referred, but is in keeping with the whole spirit of the Act, including the power it has vested in the Secretary to exclude, exempt and suspend as respects the processing tax; and, further, it is confirmed by the last parts of Subdivs. (E) and (G) of Par. (6) of Sec. 9(b) and by the following language of Sec. 9(c), which was added by Sec. 13 of the 1935 Amendments:

> "The rate of tax upon the processing of any commodity, in effect on the date on which this amendment is adopted, shall not be affected by the adoption of

this amendment and shall not be required to be adjusted or altered, *unless the Secretary of Agriculture finds that it is necessary to adjust or alter any such rate pursuant to Section 9(a) of this title.*"

The Secretary has so construed Sec. 9(a). See *Vogt* v. *Rothensies* (D. C. Pa., 11 F. Supp. at 229-30), which explicitly so shows.

Even if the Act as amended be held to have established a maximum beyond which the Secretary may not increase the rates, such as (1) the general standard erected in Sec. 9(b)(1) (which we do not consider sufficiently definite to be a standard) or (2) the rates specified in Pars. (2), (3), (4) and (5) of Sec. 9(b), that would not prevent the exertion of the revenue powers of the Act from being unconstitutional and void, not only because there is no standard or limitation for the expenditures of the revenues which the Secretary may make, but also because of the unlimited discretion, to be exercised according to no definite standard, in the Secretary to change the rates between zero and the maximum, as well as to suspend the rates and exclude commodities and exempt persons therefrom.

In the *Hampton* case (276 U. S. 394, 72 L. ed. 624), it was not the fact that the variation authorized was within the limits of a percentage of a named rate which caused the Court to uphold the Act, but that the Executive Department was simply authorized to ascertain a definite fact by virtue of which the rate might be changed—not to change the rate in accordance with the discretion of the Executive Department to produce thereby desired effects as the result of increasing or lowering the tax, such as raising or lowering the prices of commodities, increasing or decreasing the production of commodities, exempting persons and excluding commodities from the tax, as well as suspending the tax, which vest the change entirely in the discretion of the Executive Department for such purposes.

The broad discretion, which we have just indicated did not characterize the Act upheld in the *Hampton* case, is

exactly what the Act under consideration has conferred on the Secretary of Agriculture as respects the imposition of a tax, as well as the expenditures of the revenues derived therefrom; and, in addition, he may altogether suspend the tax or exempt persons or exclude commodities therefrom, which are further discretionary and discriminatory powers not authorized in the Act upheld in the *Hampton* case.

The discretion is just as broad as in the Act condemned on this account in the *Panama Refining* and *Schechter* cases, subject only to the maximums, if there be such a limitation in the Act.

But there is no maximum standard. As we have just shown, by the express provisions of Subdiv. (D) of Par. (6) of Sec. 9(b), any rates prescribed or established under the new provisions added by the 1935 Amendments may be "increased" in accordance with the general provisions that have heretofore been in the Act, and these include the positive provisions of Sec. 9(a) that the Secretary of Agriculture, "at such intervals" as he "finds necessary to effectuate the declared policy" of the Act, may adjust the rates "to conform to such requirements".

We thus find that the Secretary under and subsequent to the 1935 Amendments has the very same broad, indefinite discretion as to taxation, in all its essentials, for doing what he considers proper to effectuate the declared policy of the Act that he had prior to those Amendments.

There remains for consideration the consequences of the invalidity of the taxing provisions of the Act as amended. As to this, in addition to the usual provision that the invalidity of one part of the Act shall not affect the rest (Sec. 14), there is Subdiv. (G) of said Par. (6) of Sec. 9(b), which provides that if the applicability to any person or circumstances "of any tax the rate of which is *fixed pursuant to this paragraph (6)*" is finally held invalid "by reason of any provision of the Constitution" or "of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title", then *"in lieu of all rates of tax fixed in pursuance of this paragraph (6)* with respect to all tax liabilities incurred under

this title on or after the effective date of each of the rates of tax *fixed in pursuance of this paragraph (6)*", there shall be assessed and collected the "rates of tax fixed under paragraphs (2), (3), (4) or (5) of section 9(b)" and such rates shall be in effect "until altered by Act of Congress" unless sooner terminated by proclamation as authorized by the Act.

The effect of this Subdiv. (G) is confined by its terms to such invalidity of any tax fixed *in pursuance of Par. (6)* of Sec. 9(b), and therefore

(1) it has no application after July 31st, 1936 as respects rice, and after December 31st, 1927 as respects the other commodities, for by Subdiv. (F) of Par. (6) after those dates "rates of tax shall be determined by the Secretary of Agriculture in accordance with the formulae, standards and requirements prescribed in this title, but not in this paragraph (6), and shall, subject to such formulae, standards and requirements, thereafter be effective"; and

(2) it has no application to rates fixed pursuant to the powers given the Secretary for this purpose by Secs. 9(a) and 9(b)(1), as well as in 9(c), 11, 15(a) and 15(b).

So Subdiv. (G) has only a limited scope for a limited period. And within that period the question arises, when is a given rate fixed pursuant to Par. (6) or under the other broad powers in the Act. Whether or not such fixing is a mere mental operation on the part of the Secretary or a selection he may make in the instrument fixing the tax is not the point. The point is this nebulous endeavor of Congress to give complete discretion as to rates to the Secretary of Agriculture and yet have some provision which will sustain the rates or deter their being questioned.

Of course, Subdiv. (G) is not for the purpose of imposing a rate desired by Congress, but a provision to deter interference by processors with the rates Congress wishes the Secretary, in his discretion, to have power to make. In this respect the subdivision is a use of the taxing powers as a penal means of accomplishing unconstitutional ends, such as the Supreme Court condemned in the *Child Labor* case, 259 U. S. 16, 66 L. ed. 816.

Manifestly the subdivision will not sustain the tax if the Act is held unconstitutional on the grounds we have urged of an unconstitutional use of the commerce and revenue powers to regulate intrastate activities and take the property of one private citizen and bestow it on another. The same thing is true if the Act be held unconstitutional because so arbitrary, capricious and discriminatory as to violate the 5th Amendment. And the same thing is true if the discretion of the Secretary as to exemptions and exclusions from the tax, as well as suspensions of the tax, vested in him legislative powers as to the tax. Such unconstitutionality would preclude the imposition or collection of any tax, however definitely fixed.

And it seems to us that the subdivision cannot save the provisions from the charge of the unconstitutional delegation of the taxing power, for the reason that it is a part of an evident scheme to circumvent this fundamental of our Government, tainted with that purpose, which would not have been enacted to fix rates in and of itself, but only to deter a questioning of the discretion conferred by other provisions. And in this view it comes in the category of a term so interwoven with other unconstitutional terms that the whole must fall together, under the doctrine of such cases as *Dorchy* v. *Kansas,* 264 U. S. 286, 290-1, 68 L. ed. 686, 690; *Butts* v. *M. & M. Trans. Co.,* 230 U. S. 126, 57 L. ed. 1422; *Hill* v. *Wallace,* 259 U. S. 44, 70, 71, 66 L. ed. 822, 830-1; and *Williams* v. *S. O. Co.,* 278 U. S. 235, 241, 73 L. ed. 287, 309, and note. See, also, the decision of the Supreme Court on May 6th, 1935, in the *Railroad Retirement Act* case, 295 U. S. at 361-2.

APPENDIX B.

Ratifying Sections of 1935 Amendments, with other relevant provisions and extracts from reports and opinions thereon.

Sec. 21 (b). The taxes imposed under this title, *as determined,* prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby *legalized* and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) *prior to said date* are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

Sec. 21 (c). The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, *as determined,* prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary, and *the initiation,* if formally approved by the Secretary of Agriculture prior to such date of adjustment programs under section 8 (1) of this title, and the making of agreements with producers prior to such date, and the adoption of other voluntary methods

prior to such date, by the Secretary of Agriculture under this title, and rental and benefit payments made pursuant thereto, are hereby *legalized* and ratified, and the making of all such agreements and payments, *the initiation of such programs,* and the adoption of all such methods *prior to such date* are hereby legalized, ratified, and confirmed as fully to all intents and purposes as if each such agreement, program, method, and payment had been specifically authorized and made effective and the rate and amount thereof fixed specifically by prior Act of Congress.

Sec. 21 (d) (1). No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, *any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax),* unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, *that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly,* included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, *or passed on any part of such amount to the vendee or to any other person in any manner,* or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. *In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner, shall be duly certified and filed as the record in the*

case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund, or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

Sec. 21 (g). The provisions of section 3226, Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery on any amount of any tax, penalty, or interest, which accrued, before, on, or after the date of the adoption of this amendment under this title (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsections (a) or (c) of section 15, section 16, or section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930."

The Agricultural Adjustment Administration in its bulletin of August 30, 1935 entitled "Detailed Outline Of AAA Amendments" says page 5 thereof, that under Sec. 21 (d) (1) added by Sec. 30 of the 1935 Amendments, a recovery through claim for refund

> "*will be allowed only* when the plaintiff satisfies the Commissioner of Internal Revenue that he has not (a) included the tax in the price of the article, *or* (b) *passed any part of it on to the buyer,* or (c) included any part of it in the charge or fee for processing, or (d) paid a reduced price for the article because of the tax. Provision is made for court review of the Commissioner's determination on the basis of the record made before him."

The Federal District courts have thus commented on

the provisions of said Sec. 21 (d) (1) with respect to claim for refund:

Judge Barnes, in *Armour & Co.* v. *Harrison* (N. D. Ill., August 1, 1935), who said: "For the life of me I cannot figure out how a processor, assuming that he sells the pork and sells it for more than the amount of the processing tax, would ever be able to prove he did not pass on the tax"; Judge Hincks, in *Baltic Mills Co.* v. *Bitgood* (D. C. Conn., August 28, 1935), who said: "If on the other hand the processor, through sales at a legitimate profit, opens himself to a suspicion that he has passed on the tax, he will be wholly without evidence to prove the contrary"; and Judge Paul, in *Shenandoah Milling Co.* v. *Early* (W. D. Va., September 23, 1935), who said: "The conditions imposed are practically impossible to perform and I suppose Congress in a large measure realized that."

The Report of the Conference Committee (H. R. No. 1757, p. 32) thus comments on the provision of Sec. 21 (d) (1) which confines the court to the record certified by the Commissioner:

> "Under the Senate amendment, the facts required to be established to obtain the relief could be established before the Commissioner or before the court in any judicial proceeding relating to the claim. Under the Senate amendment the matter is determined on the basis of evidence taken by the court. *Under the conference agreement a transcript of the hearing before the Commissioner is filed with and certified to the court and that record constitutes the evidence in the proceeding. No trial de novo on the facts by the court is provided for* as is provided in the Senate amendment *nor can judicial proceedings be brought in the absence of the prior administrative hearing and record.* This provision applies to suits against the collector as well as against the United States and applies if the issue comes up in connection with any other suit involving the United States or the collector and the claimant."

FILE COPY

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NO. 401

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIAM M. BUTLER, et al., Receivers of
HOOSAC MILLS CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF VERNON A. VROOMAN, COUNSEL FOR THE LEAGUE FOR ECONOMIC EQUALITY, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST DISTRICT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it please the Court:

The undersigned, as counsel for The League for Economic Equality, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

VERNON A. VROOMAN,
Counsel for the League for Economic Equality, as *Amicus Curiae.*

Supreme Court of the United States

OCTOBER TERM, 1935

No. 401

UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIAM M. BUTLER, et al., Receivers of
HOOSAC MILLS CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST DISTRICT

BRIEF OF VERNON A. VROOMAN AS AMICUS CURIAE

PRELIMINARY STATEMENT

In this brief it is contended that sections 9 and 16 of the Agricultural Adjustment Act, c. 25, 46 Stat. 31, providing for processing and floor-stocks taxes, are constitutional.

The undersigned offers this brief as counsel for the League for Economic Equality, an organization supported by farmers and friends of farmers in four of the Corn-Belt States—Iowa, Minnesota, Nebraska and South Dakota. The matters involved in the case at bar are of vital concern

to the farmers of those states. No less in the Corn Belt than in the Cotton Belt are farmers interested in the establishment and maintenance of a balance between the supply of, and the effective demand for, the products of agriculture, and in securing and preserving economic equality between agriculture and other industries, with parity between the prices of agricultural and the prices of nonagricultural products. Wherefore it is the desire of the League that a brief by its counsel be filed in this case, to assist the Court in reaching a decision herein.

This brief is drawn upon the theory that any legal rule or principle bearing upon the question of the constitutionality of the tax measures involved in this case, whether or not such rule or principle was stated to or considered by the lower courts when this case was before them, may be stated to this Court. The question of the constitutionality of a law is a matter of such public concern that the Court, it would seem, should always be a third party to any litigation involving such a question, even when a State or the United States is formally a party to the litigation, and in coming to a decision of the question the Court should not be isolated from any rule or principle because such rule or principle was not mentioned in the case when the case was in the lower courts. It would seem that the limits of consideration of so important a queston should not be fixed, in this Court, by the number and scope of the legal rules and principles addressed to the question before it reached this tribunal.

This brief is drawn by one who believes that, as far as constitutional law is concerned, only moderate reliance should be placed on judicial precedents, and that the Constitution itself should, at any given time, be matched against the problems of that time, with a view to ascertaining

whether it is not susceptible of a reasonable interpretation rendering it equal to those problems. "One other duty," says Warren (The Supreme Court in United States History, Vol. 2 of the 1926 ed., p. 748), "towards the Court and towards the public is owed by counsel which should be unflinchingly performed, namely to insist that the doctrine of *stare decisis* can never be properly applied to decisions upon constitutional questions. However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court. * * *"

No less in the realm of constitutional law than in that of politics or that of economics must realism prevail, and the Constitution must be put to the test of pragmatism in every day and age of the life of our country. We must realize that the words of our Constitution "have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Missouri v. Holland, 252 U. S. 416, 433.
And see *Home Building & Loan Assn. v. Blaisdell*; 290 U. S. 398, 442-3.

He who seeks interpretation of the Constitution predicates his case upon it. He who predicates his case upon the Constitution seeks to uphold the Constitution. To advocate one interpretation of the Constitution and challenge another interpretation thereof is not to challenge the Constitution itself.

SUMMARY OF ARGUMENT

The argument involves two main general propositions concerning the processing and floor-stocks taxes provided for by sections 9 and 16 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31.

I. Sections 9 and 16 of the Agricultural Adjustment Act, judged by the purposes of the Act as a whole, manifest an exercise of powers which the Constitution confers upon Congress in the interests of the general welfare.

II. Sections 9 and 16 of the Agricultural Adjustment Act contravene none of the limitations which the Constitution places upon congressional action.

Under the first main general proposition it is contended: A. The supreme object of the Constitution as a whole is the general welfare of the people of the United States. B. The processing and floor-stocks taxes manifest an exercise of the power conferred upon Congress by Clause 1 (the tax clause) of Section 8 of Article I of the Constitution. C. The purposes of the Act as a whole, if not otherwise warranted, are justified by the existence of economic conditions constituting an occasion for the exercise of the national police power. D. In connection with the force and effect of the general-welfare purpose stated in the Preamble to the Constitution, and the general-welfare provision of Clause 1 of Section 8 of Article I of the Constitution, the last clause of the said section 8, relative to making all laws that shall be necessary and proper, etc., should be considered.

Under the second main general proposition it is contended: A. Neither the processing taxes nor the floor-stocks taxes are within the prohibition of Section 9 of Article I of the Constitution, that no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumera-

tion which in the Constitution is directed to be taken. B. Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that the excises they impose are not uniform throughout the United States. C. These excises do not contravene the Fifth Amendment. D. They do not contravene the Tenth Amendment. E. Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that they attempt to delegate legislative power to the executive branch of the government.

We now go into a more detailed summary of each of the main general propositions.

I. Sections 9 and 16 of the Agricultural Adjustment Act, judged by the purposes of the Act as a whole, manifest an exercise of powers which the Constitution confers upon Congress in the interests of the general welfare.

A. The supreme object of the Constitution as a whole is the general welfare of the people of the United States.

To promote the general welfare, in some way, should be the object of every political act, and the promotion of the general welfare is the most general purpose stated in the Preamble to the Constitution. That purpose includes all the other purposes stated in the Preamble, and indicates that in other ways than those stated therein the general welfare may be promoted. General welfare is the primary object of all positive law.

Legislative acts differ in degree only, in point of serving the general welfare. See *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 413.

The common good is the good of all.

"General welfare," "public welfare," "common welfare" mean the same. *Stockton v. Williams* (Mich.), 1 Doug. 546, 570; *Kirkendall v. Omaha,* 39 Neb. 1, 57 N. W. 752, 754; *Spokane Traction Co. v. Granath,* 42 Wash. 506,

85 Pac. 261, 264; *Aymette v. State,* 2 Humph. (21 Tenn.) 154, 158.

It embraces every matter which, with respect to any interest, whatever it may be (e. g., any social, political or economic interest), involves the welfare of all who constitute a given community (e. g., a city, a State, the United States), the term being of the broadest import with regard to the number and diversity of the matters and the number of individuals and classes it concerns and connoting the antithesis of special or private interest. *Standard Oil Co. v. City of Bowling Green,* 244 Ky. 362, 50 S. W. (2d) 960, 961; *State v. Hutchinson Ice Cream Co.,* 168 Iowa 1, 10, 147 N. W. 195, 199, L. R. A. 1917 B, 1918; *Miller v. Board of Public Works,* 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479; *Pettis v. Alpha Alpha Chapter,* 115 Neb. 525, 213 N. W. 835, 838; *Steele-Smith Dry Goods Co. v. Birmingham Ry. Light & Power Co.,* 14 Ala. App. 271, 73 So. 215, 216; *Platt v. Craig,* 66 Ohio 75, 63 N. E. 594, 595; *Chamberlain v. City of Burlington,* 19 Iowa 395, 403; *Cawker v. Meyer,* 147 Wis. 320, 133 N. W. 157, 37 L. R. A. N. S. 510.

The direct benefit of some may be the indirect benefit of others and thus in ultimate the benefit of all; legislation which confers direct benefit on some with a view to achieving the benefit of all has the general welfare for its object. *Village of Carthage v. Frederick,* 122 N. Y. 268, 25 N. E. 430, 481. And see *Chicago, Burlington & Quincy Ry. Co. v. People,* 200 U. S. 561, 593.

The more complex the economic life of the Nation, the greater the number of matters which become of national import and concern, in point of general welfare, and which pass beyond the possibility of effective State action. The Constitution could hardly have been intended to preclude national action in such matters.

B. The processing and floor-stocks taxes manifest an exercise of the power conferred upon Congress by Clause 1 (the tax clause) of Section 8 of Article I of the Constitution.

(1) The Preamble states the general purpose of the Constitution, "to promote the general welfare." Clause 1 of Section 8 of Article I of the Constitution empowers Congress to lay and collect taxes "to provide for * * * the general welfare."

Every part of the Constitution should be interpreted in the light of the general-welfare purpose expressed in the Preamble. See *Holmes v. Jennison,* 14 Pet. 540, bot. 570; Also *Commonwealth v. City of Newport News* (Va.), 164 S. E. 689, 696.

Congress may impose taxes to provide for *whatever* is within the scope of the national general welfare. Story, Commentaries on the Constitution, 5th ed., secs. 911-913. And see Burdick, The Law of the American Constitution, sec. 77.

In *United States v. Gettysburg Electric Ry.,* 160 U. S. 668, 680, the Court came very close to, if it did not actually arrive at, the point of regarding promotion of the general welfare as within a general power of Congress. See 2 Warren, The Supreme Court in United States History (1926 ed.), p. 706.

(2) There is but little restriction upon the power of Congress to regulate, by means of taxation, the production, manufacture, sale and transportation of articles within the States. See 2 Warren, The Supreme Court in United States History (1926 ed.), p. 738. Also Burdick, The Law of the American Constitution, sec. 78. Thus Congress may often achieve through taxation what it may not achieve otherwise. Cross-reference: Argument, II C (2). The power of taxation may validly become the power of destruction, and the

motive for destruction be beyond judicial inquiry. Cross-reference: Argument, II C (1). Thus Congress, by imposing a tax as distinguished from a penalty, may even go so far as to *destroy* one thing in order to *save* another.

(3) Processing and floor-stocks taxes bear analogies to protective tariffs. *Protective* duties are not imposed just to pay the debts of the United States or provide for the common defense, but are imposed to provide for the general welfare. See *Field v. Clark*, 143 U. S. 649, 696. Also *Child Labor Tax Case*, 259 U. S. 20, bot. 24.

The Constitution "has known protective tariffs for a hundred years." *Alaska Fisheries Co. v. Smith*, 255 U. S. 44, 48. In fact, they date from the second act of the First Congress, and therefore from a time when framers of the Constitution were actively participating in public affairs. *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 411-12. And see suggestion of counsel in *Hill v. Wallace*, 259, U. S. 44, 53. If the framers of the Constitution thought that imposts were for the general welfare, and constitutional, when laid to encourage and protect manufacturing, would they not have deemed excises to be for such welfare, and equally constitutional, if it had been felt necessary, and had been proposed, to lay them to provide means with which to encourage and protect agriculture?

(4) The Act does not preclude appropriation of the proceeds of these excises to other purposes. These taxes (see section 19 of the Act) go into the general fund of the Treasury. The existence of the economic emergency is recognized in various acts and in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, and these excises may be appropriated to finance any of these acts. See section 19 of the Act. And see section 14 thereof. Congress has not permitted the validity of these excises to depend upon whether

the agricultural features of the Act are constitutional, nor has Congress foreclosed itself from appropriating to any permissible purposes the revenues which these excises produce. Congress may even devote these revenues to the discharge of moral obligations. *United States v. Realty Co.*, 163 U. S. 427, 437 *et seq.* We contend that the obligation of the agreements which the Secretary of Agriculture has made with millions of farmers is legal. The reliance of these farmers upon the validity of the agreements will have created a moral obligation on the part of the United States, in the event that such agreements are declared unconstitutional.

C. The purposes of the Act as a whole, if not otherwise warranted, are justified by the existence of economic conditions constituting an occasion for the exercise of the national police power.

(1) National police power under the tax clause, the commerce clause and the post-roads clause is broad, and overrides all State legislation except such as may be "construed as no interference with the authority of the National Government." See 2 Warren, The Supreme Court in United States History (1926 ed.), p. 739. It is submitted that the national police power extends beyond the boundaries of the clauses just mentioned. Taxes laid and collected with the agricultural rental and benefit payments in mind are laid and collected in behalf of a welfare for the protection of which the police power of the Nation may be exerted.

The police power involves the sociological interpretation of our Constitution and law. Drake, The Sociological Interpretation of Law, 16 Michigan Law Review, 599, 614. And see 2 Warren, The Supreme Court in United States History (1926 ed.), P. 740. The object of the police power, like that of the Constitution, is general welfare. *Ibid.*, 744.

As to the Tenth Amendment: "We must consider what this country has become in deciding what that Amendment has reserved." *Missouri v. Holland*, 252 U. S. 416, 434. According to that Amendment, not only are powers reserved to the States but powers are reserved to the people of the United States. See *Kansas v. Colorado*, 206 U. S. 46, 90. The "people of the United States," a people existing under the Articles of Confederation, adopted the Constitution. *Scott v. Sanford*, 19 How. 393, 404; *Martin v. Hunter*, 1 Wheat. 304, 324; *Chisholm v. Georgia*, 2 Dall. 419, 470; *Barron v. Baltimore*, 7 Pet. 243, 247. The Ninth Amendment insures certain rights to that people. *Holmes v. Jennison*, 14 Pet. 540, 557. Among the powers and rights reserved and insured to the national people is the police power. It is a "reserved" power—a reserve element of sovereignty. 12 C. J., Const. Law, sec. 412; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 444; *Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 1103, 184 N. W. 823, 826-7. The police power of the States is police power in matters which do not affect the national people as a whole and do not lie beyond the scope of effective State action. 12 C. J., Constitutional Law, sec. 417, criticized, and the fear expressed in *Kansas v. Colorado*, 206 U. S. 46, 91, not entertained. The police power is impliedly a part of the Constitution, in the sense of a thing which is by necessity impliedly recognized by the Constitution, inasmuch as the police power and the power of making, changing and amending constitutions are parts of the sovereign power of the people, and inasmuch as general welfare is the ultimate object of all manifestations of sovereignty. Congress may exercise the police power of the Nation in a matter involving the entire citizenry of the Nation. 12 C. J., Const. Law, sec. 417, explained.

The exercise of the national police power seems particu-

larly called for in a matter that is national on so great a scale that State legislation in the matter, unless in aid of national legislation, would be practically futile. Nor can the States enact protective tariffs, enter into agreements or compacts with one another, make treaties with foreign nations, or regulate the value of money, in order to deal with the agricultural emergency." Constitution, Art. I, Sec. 10.

A law enacted to protect the public is not invalid if it has a real or substantial relation to public welfare, and is not a clearly arbitrary or oppressive act, or the result of passion, ignorance or folly. 2 Warren, The Supreme Court in United States History (1926 ed.), p. 745, and cases cited; Learned Hand, Due Process of Law and the Eight-Hour Day, 21 Harvard Law Rev. 495, 500.

(2) The Agricultural Adjustment Act embodies a conservation program, in effect forcing the resting of the soil from too frequent production of the same sort of crop, thus tending to conserve certain areas especially suited to the production of certain commodities, which areas (e. g., the corn belt and the cotton belt) are great national assets on which national prosperity greatly depends. Police-power legislation need not in terms refer to the police power. The facts on which the exercise of the power depends, with respect to the conservation of the areas above mentioned, may be judicially noticed. 23 C. J., Evidence, secs. 1810 and 1860.

The several States included in one of these areas can not enter into compacts with one another in order to conserve the soil of the area. Constitution, Art. I, Sec. 10, Cl. 3.

There are sufficient checks upon attempts to exercise the police power unduly. Measures invoking it must run the gamut of legislative enactment, presidential approval and judicial scrutiny. And must be reasonably necessary, also

reasonable in method. See *American Coal Mining Co. v. Special Coal and Food Commisison of Indiana,* 268 Fed. 563, 570 (appeal dismissed; 248 U. S. 632), and *Nebbia v. New York,* 291 U. S. 502, 525. In point of whether it calls for voluntary action or imposes coercive measures, the Agricultural Adjustment Act differs from the National Industrial Recovery Act, and the case at bar is correspondingly distinguishable from *Schechter v. United States,* 79 L. Ed. 888. The rights of a State are not invaded where the State has an option to act or not to act. *Massachusetts v. Mellon,* 262 U. S. 447, 480. The same would seem to be true of the rights of the individual.

At any rate, economic emergency justifies the Act, under the police power, as a short-time program at least, for reasons stated in the Act itself. See, therein, the Declaration of Emergency. Emergency is the occasion, though not the source, of the power. *Schechter v. United States,* 79 L. Ed. 888, 894, and cases there cited. The agricultural emergency may be judicially noticed. Matters of common knowledge, the contents of presidential proclamations, declarations of emergency in congressional acts, allusions to emergency in the Congressional Record, may all be judicially noticed. 23 C. J., Evidence, sec. 1810; sec. 1900; sec. 1934, f. n. 95 (a, 4); sec. 1947. It has been *held* that a court may judicially notice the existence of a public emergency. *Block v. Hirsch,* 256 U. S. 135, 154.

D. In connection with the force and effect of the general-welfare purpose stated in the Preamble, and the general-welfare provision of Clause 1 of Section 8 of Article I of the Constitution, the last clause of said Section 8, relative to making all laws that shall be necessary and proper, etc., should be considered.

The force and effect of the clause is to enlarge congres-

sional power. *McCulloch v. Maryland,* 4 Wheat. 316, 415; *Legal Tender Cases,* 12 Wall. 457, 531, 550; *Legal Tender Cases,* 110 U. S. 421, 440. If from the Preamble, the tax clause and the last clause of said Section 8, a power to act in behalf of the general welfare does not exist, to the extent necessary to render the Agricultural Adjustment Act constitutional, we are at a loss to account for the constitutionality of many things that have been held to be, else are habitually regarded as, constitutional. There is an analogy between the implied power of Congress to enact certain laws and the implied power of the Court to declare laws unconstitutional. Under the Constitution many things not mentioned therein may be provided for. Instance banks. The Louisiana Purchase and other like purchases are undoubtedly constitutional.

II. Sections 9 and 16 of the Agricultural Adjustment Act contravene none of the limitations which the Constitution places upon congressional action.

A. Neither the processing taxes nor the floor-stocks taxes are within the prohibition of Section 9 of Article I of the Constitution, that no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration which in the Constitution is directed to be taken.

These taxes, being upon things done to or with commodities or the articles processed from them, are not direct taxes but excises. *Tyler v. United States,* 281 U. S. 497, 502; *Y. M. C. A. v. Davis,* 264 U. S. 47; *Edwards v. Slocum,* 264 U. S. 61; *Billings v. United States,* 232 U. S. 261, 279; *Stanton v Baltic Mining Co.,* 240 U. S. 103, 114; *Flint v. Stone Tracy Co.,* 220 U. S. 107; *Thomas v. United States,* 192 U. S. 363; *Knowlton v. Moore,* 178 U. S. 41; *Murdock v. Ward,* 178 U. S. 139; *Nicol v. Ames,* 173 U. S. 509; *Scholey v. Row,* 23 Wall. 346; *Hylton v. United States,* 3 Dall. 171.

In *Stratton's Independence v. Howbert,* 231 U. S. 399, top of 415, the term "processing tax" was almost applied to a certain excise.

Subsection 16(a) does not impose floor-stocks taxes on stocks not held for sale or other disposition. Other disposition means something in the same class with sales. Rule of *ejusdem generis.* And see subsection 15 (b). Subsection 16(a) anticipates sales or other dispositions. Discontinuance of a processing tax involves a rebate of moneys paid under the corresponding tax on floor stocks, the rebate being on the basis of so much of such stocks as remain unsold or otherwise undisposed of when such processing tax is discontinued. And subsection 16 (a) *in terms* imposes the floor-stocks taxes on sales and other dispositions of certain processed articles. *Patton v. Brady,* 184 U. S. 608, is in point.

If he who pays a tax may shift the burden thereof to another, the tax is an excise. *Pollock v. Farmers Loan & Trust Co.,* 157 U. S. 429, 558. And see Cooley, Taxation (3d ed.), p. 10. Also 61 C. J., Taxation, sec. 6, f. n. 57.

Even a tax imposed directly upon ownership or a thing owned is treated as an excise if laid to prevent the evasion of an excise. *Tyler v. United States,* 281 U. S. 497, 505 (citg. *Taft v. Bowers,* 278 U. S. 470, 482); *District of Columbia v. Brooke,* 214 U. S. 138, 150; *Milliken v. United States,* 283 U. S. 15, 23.

B. Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that the excises they impose are not uniform throughout the United States.

The Constitution requires geographical uniformity, only, in the imposition of excises. *LaBelle Iron Works v. United States,* 256 U. S. 377, 392. And on the processing of a hundred pounds of hogs the tax is the same anywhere in the

United States. So is the floor-stocks tax on any article processed, wholly or in chief value, from hogs.

There is an analogy between geographical uniformity with respect to bankruptcy laws (Constitution, Art. I, Sec. 8, Cl. 4), and such uniformity with respect to excises. As to uniformity "throughout the United States," in connection with bankruptcy laws, see *Leideigh Carriage Co. v. Stenzel,* 95 Fed. 637. An excise is uniform if it applies everywhere in the United States and in the same manner to all who come within its terms. *Patton v. Brady,* 184 U. S. 608, 622. And, as certain decisions under the Bankrutpcy Act attest, a law may be uniform throughout the United States, even though in actual application the law may produce somewhat different results in different parts of the country, in view of differences existing outside of the law itself. *Darling v. Berry,* 13 Fed. 659; *Hanover National Bank v. Moyses,* 186 U. S. 190; *Stellwegen v. Clum,* 245 U. S. 605.

C. These excises do not contravene the Fifth Amendment.

(1) The Fifth Amendment is not a limitation on the Nation's power of taxation. *Brushaber v. Union Pacific Rd. Co.,* 240 U. S. 1, 24, and cases there cited. See also *United States v. Bennett,* 232 U. S. 299, bot. 307, and f. n. vi on 308.

A business may be destroyed by taxation without violation of the clause. *Alaska Fisheries Co. v. Smith,* 255 U. S. 44, 48. See also *McCulloch v. Maryland,* 4 Wheat. 316, 431. How burdensome a tax may be and to whom it is to be a burden, are legislative rather than judicial matters. *Veazie Bank v. Fenno,* 8 Wall, 533, 548. And see *Child Labor Tax Case,* 259 U. S. 20, 40.

Where duties were imposed illegally, under executive order, congressional ratification of the imposition of the duties was held not to contravene the Fifth Amendment—not even if with respect to duties as to which, at the time of

such ratification, persons who had paid them had an action pending to recover them. *United States v. Heinszen,* 206 U. S. 370, 386 *et seq.*

(2) It is to be noted that we are dealing, not with statutes imposing penalties, but with statutes imposing taxes, and when what is imposed is genuinely a tax, it does not contravene the Fifth Amendment, nor does the motive for imposing it matter. *Magnano Co. v. Hamilton,* 292 U. S. 40, 44 *et seq.,* esp. bot. 47; *Tyler v. United States,* 281 U. S. 497, 504; *Regal Drug Corporation v. Wardell,* 260 U. S. 386, bot. 391; *Lipke v. Lederer,* 259 U. S. 557; *Alaska Fisheries Co. v. Smith,* 255 U. S. 44, 48-49; *McCray v. United States,* 195 U. S. 27; *In re Kollock,* 165 U. S. 526, bot. 536.

The statutes involved in the case at bar do not present, as did those involved in the *Child Labor Tax Case,* 259 U. S. 20, 36, 42, a penalty for a departure from a standard of conduct.

D. These excises are not invalid on the ground that they contravene the Tenth Amendment.

They do not "contravene any prohibiting words to be found in the Constitution" (language borrowed from *Missouri v. Holland,* 252 U. S. 416, 434). Cross-reference, I C (1). These excises, being genuine, are not "forbidden by some invisible radiation of the Tenth Amendment" (language borrowed from *Missouri v. Holland, supra*). Cross-reference, I C (2). The Tenth Amendment does not operate "to take away the grant of power to tax conferred by the Constitution upon Congress." *McCray v. United States,* 195 U. S. 27, 61. The implications of the *Child Labor Tax Case,* 259 U. S. 20, are to the effect, and the law is, as shown by cases there discussed, that if what is called an excise is in reality such, and not a penalty upon a departure from a standard of conduct, then no matter how great the excise

or what the act or event on which it falls, and though apart from the imposition of the excise such act or event is a matter of State cognizance only, the excise does not contravene the Tenth Amendment.

E. Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that they attempt to delegate legislative power to the executive branch of the government.

(1) The difficulty in this matter lies more in applying than in laying down principles. *State v. Public Service Commission,* 94 Wash. 274, 279, 162 Pac. 523, 525. Congress may lay down policies and establish standards, "leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." *Panama Refining Co. v. Ryan,* 293 U. S. 388, 421. And see *Schechter v. United States,* 79 L. Ed. 888, 895. Evidently findings may be without notice and without the assistance of a fact-finding body. *The Cargo, etc., v. United States,* 7 Cranch 382; *Marshall Field & Co. v. Clark,* 143 U. S. 649, 693; *J. W. Hampton, Jr., & Co. v. United States,* 276 U. S. 394, 409-11.

The context of a section may bear upon whether the section properly delegates authority. *Panama Refining Co. v. Ryan,* 293 U. S. 388, 416; *Federal Radio Commission v. Nelson Bros. Bond & Mort. Co.,* 289 U. S. 266, 285.

After the determination and proclamation mentioned in subsection (a) of Section 9, a processing tax takes effect at a fixed time. Such determination is made only upon the existence of facts warranting it—facts to which the policy declared in section 2 of the Act apply. Subsection (b) of section 9 sets up a standard to be adhered to in fixing the rate of the tax. The subsection contemplates that the rate

shall be predicated upon findings of fact, and subsection (c) of Section 9 states how the findings shall be made.

With respect to the matter of delegation of power, the Agricultural Adjustment Act compares favorably with the Flexible Tariff Act upheld in *J. W. Hampton, Jr., & Co. v. United States,* 276 U. S. 394, and with the act upheld in *Federal Radio Commission v. Nelson Bros. Bond & Mort. Co.,* 289 U. S. 266.

Under section 9, adjustments of the tax rate must be for the purpose of effectuating the policy declared in section 2 of the Act, and must be upon findings. It seems fair to infer that discontinuance of a processing tax shall occur upon a finding that such discontinuance is in accord with said policy.

The marketing year of a commodity is an objective fact, to be determined as such.

If there is no improper delegation of power in connection with processing taxes, there is none in connection with floor-stocks taxes, as imposition or discontinuance of the latter automatically concurs with the imposition or discontinuance of the former. Section 16 of the Act.

(2) It does not devolve upon petitioner to show that these taxes are constitutional, but upon respondents to show, if possible, that they are not. 12 C. J., Const. Law, sec. 221; 3d Dec. Dig., Const. Law, sec. 48. The presumption of constitutionality is very strong. *United States v. Gettysburg Electric Ry.,* 160 U. S. 668, 680.

(3) Even if sections 9 and 16 of the Agricultural Adjustment Act have involved an undue delegation of power, the excises imposed by said sections have been legalized and ratified.

See section 21 (b) of the Act as amended.

Said section 21 (b) accords with several precedents.

United States v. Heinszen, 206 U. S. 370; *Graham v. Goodcell,* 282 U. S. 409; *Charlotte Harbor & Northern Ry. v. Welles,* 260 U. S. 8, 11; *Rafferty v. Smith, Bell & Co.,* 257 U. S. 226; *Stockdale v. Atlantic Ins. Co.,* 20 Wall. 323.

If the provisions of the Act with regard to rental and benefit payments and the contracts and arrangements concerning them have involved an undue delegation of power, the things done in these connections have likewise been legalized and ratified.

See section 21 (c) of the Act as amended.

Said section 21 (c), also, accords with precedents. Those mentioned above are in point. See also *Hodges v. Snyder,* 261 U. S. 600, bot. 602; *Tiaco v. Forbes,* 228 U. S. 549.

It is submitted that respondents can not challenge the agricultural features of the Act. *Jeffrey Mfg. Co. v. Bragg,* 235 U. S. 571, 576, and cases there cited; *Frothingham v. Mellon,* 262 U. S. 447, 486 *et seq.*

ARGUMENT

I.

Sections 9 and 16 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31, judged by the purposes of the act as a whole, manifest an exercise of powers which the Constitution confers upon Congress in the interests of the general welfare.

A.

The supreme object of the Constitution as a whole is the general welfare of the people of the United States.

It would seem that any political act, from the ordination of a constitution down to the enactment of a municipal ordinance, should have as its object the welfare of the community to be affected by it—the general welfare of the nation, the general welfare of a State of the United States, the general welfare of county or township, city or village.

That the general welfare of the people of the United States is the object of the Constitution of the United States is attested by the Constitution itself. The Preamble to the Constitution is as follows: "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Promotion of the general welfare is the most general purpose stated in the Preamble. Indeed, the purpose is so general that all other purposes stated in the Preamble can be placed under the one head, promotion of the general welfare. It is easy to see that the Preamble would contain no more than it does, in substance and effect,

if it were simply this: "We the people of the United States, in order to promote the general welfare, do ordain and establish this Constitution for the United States of America."

The inclusion, in the Preamble, of a general welfare clause, indicates that by and under the Constitution the general welfare is to be promoted, not only in the several certain ways (instance establishing justice and insuring domestic tranquility) mentioned in the Preamble, but in other ways as well.

It stands to reason that the general welfare is the primary object of the Constitution, because the general welfare is the primary object of all positive law. It is simply a matter of public policy that we have law at all, and what reason of public policy there could be, for our having law, unless the reason be that the public welfare can be promoted through law, it is impossible to perceive.

Even the socalled "private acts" of legislatures are not without a measure of public importance, not without a relation, however tenuous and remote, to the general welfare. Were it not so, what possible excuse could there be for them, in a country whose government is supposed to proceed, in fact as well as theory, from the people, and to be *for* the people?

The difference between a private act and a public act, in point of service to the general welfare, is one of degree, as is likewise the difference between one public act and another, and if a given public act be specifically denominated an act for the public welfare, such act is so denominated merely because it is more obviously and immediately in the interest of that welfare than are most other public acts.

Even when on its face an act is in aid of an individual only, and is actually denominated a *private* act, it has—in

order to be justified it *must* have—some certain, even though relatively remote, public significance. Where, in point of public significance, is the dividing line between an act for the relief of John Doe and an act for the relief of a great mass of people? Perhaps no one can trace the line with precision. However, it suffices, for practical purposes, that we can sense the difference between the private and the public act. The latter is certainly *more* for the public welfare than is the former. And just as there is a difference of degree between the private and the public act, so there is a difference of degree between one public act and another, in point of the promotion of the public welfare.

In the prevailing opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 413, we find the following passage:

> "This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout v. Knox,* 148 Mass. 368. But usually in ordinary affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson v. Washburn Iron Co.,* 13 Allen 95, 104."

That "usually in ordinary affairs the public interest does not warrant much of this kind of interference" can never be gainsaid. In *Pennsylvania Coal Co. v. Mahon,* the court divided over whether considerations of general welfare within a State warranted the statute involved in that case. The majority of the court did not think so; Mr. Justice Brandeis did. He thought the statute necessary to protect the public from detriment and danger—that is to say, to promote the general welfare. In view of the public detriment and danger

involved in the agricultural situation, the Agricultural Adjustment Act is not the outgrowth of "ordinary affairs." It is the outgrowth of affairs warranting some of "this kind of interference" on a national scale. It is not to be numbered among ordinary public acts. It is in such degree in the interest of public welfare that, although all laws are in theory for that welfare, this particular act should be specifically denominated a public-welfare statute. It is not only in theory for the public welfare, but is especially so in fact.

At this point we may advert to the meaning of "general welfare."

The common good is precisely what the common man thinks it is—the good of all.

The terms "general welfare," "public welfare" and "common welfare" are synonymous.

> *Stockton v. Williams* (Mich.), 1 Doug. 546, 570;
> *Kirkendall v. Omaha*, 39 Neb. 1, 57 N. W. 752, 754;
> *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261, 264;
> *Aymette v. State*, 2 Humph. (21 Tenn.) 154, 158.

General (public, common) welfare embraces every matter which, with respect to any interest, whatever it may be (e. g., any social, political or economic interest), involves the welfare of all who constitute a given community (e. g., a city, a State, the United States). The term "general welfare," with regard to the number and diversity of the matters it may concern, is a term of the broadest import.

> *Standard Oil Co. v. City of Bowling Green*, 244 Ky. 362, 50 S. W. (2d) 960, 961.

> "The public welfare embraces a variety of interests calling for public care and control. These are: 'The primary social interests of safety, order and morals;

economic interests; and non-material and political interests.' Freund, Police Power, secs. 9, 15."

State v. Hutchinson Ice Cream Co., 168 Iowa 1, 10, 147 N. W. 195, 199, L. R. A. 1917 B, 1918.

"As our civic life has developed, so has the definition of 'public welfare,' until it has been held to embrace regulations to promote the economic welfare, public convenience and general prosperity of the community."

Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479;
Pettis v. Alpha Alpha Chapter, 115 Neb. 525, 213 N. W. 835, 838.

Not only is the term of broad import with regard to the number and diversity of the matters it may concern, including economic interest or welfare, but also with regard to the number of individuals and classes it concerns. It connotes the antithesis of the special or private interest of an individual or class.

See *Steele-Smith Dry Goods Co. v. Birmingham Ry. Light & Power Co.,* 15 Ala. App. 271, 73 So. 215, 216.
And see *Platt v. Craig,* 66 Ohio 75, 63 N. E. 594, 595.

"Mr. Webster says that 'in *general, public* expresses something common to mankind at large, to a nation, state, city or town, and is opposed to *private,* which denotes what belongs to an individual, to a family, to a company, or a corporation'."

Chamberlain v. City of Burlington, 19 Iowa 395, 403.

"The Century Dictionary defines it [public] as: 'Of or belonging to the people at large; relating to or affecting the whole people of a state, nation or community; not limited or restricted to any particular class of the community.' The New International defines it as: 'Of

or pertaining to the people; relating to or affecting a nation, state or community at large'."

Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157, 37 L. R. A. N. S. 510.

In ultimate, all persons and all interests must be beneficially affected by a law, must be directly or indirectly benefitted by attainment of its object, else the law fails to achieve a public goal. That which is directly for the welfare of many may bring welfare indirectly to all others, so that, in the ultimate, the welfare of all is promoted. Individuals and classes find their greatest *ultimate* welfare in the welfare of all.

"Judge Dillon, in his work on Municipal Corporations, volume 1, p. 212, says * * * 'If one suffers injury, it is either *damnum absque injuria,* or in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure'."

Village of Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480, 481.

And see *Chicago, Burlington & Quincy Ry. Co. v. People,* 200 U. S. 561, 593.

So, even if the recipients of the *direct* benefit of an act be a class, if the object of the act is to benefit, not the class, but the public at large (individuals and classes generally), the object is general welfare. If an act confers a direct benefit upon farmers as a class, or upon a certain class of farmers, not for the sake of the farmers only but for the sake of the public, the act is an act to promote the general welfare. There is a decided difference between legislation which has for its sole object the benefit of a class and legislation which benefits a class with a view to achieving the ultimate benefit of the public—between class benefit as an end in itself and class benefit as a means to a public end.

If agriculture be driven to the wall, the nation is driven to the wall.

(An examination into the meaning of general welfare may be found in an article entitled "The Legal Concept of General Welfare," in The Notre Dame Lawyer, Vol. X, No. 1, p. 42.)

As the economic life of the Nation develops, becoming more and more complex, the number of things that are of material import and concern increases, and hence the number of things with which the several States can not, acting each for itself, deal effectively, also increases. It is submitted that it could hardly have been the real intent of the framers of the Constitution that in those matters which are of vital national import and concern, but in which action by a State is futile, the Nation should be precluded from taking effective action to promote the general national welfare.

The view here expressed is free of dangerous tendencies. It recognizes a line of demarcation between State and Nation. It is in consonance with a representative form of government, and with all the checks and balances incident to the division of government into three branches. It does not connote any unwarranted delegation of power to the executive branch of the government; much less, as under the National Industrial Recovery Act, to groups of private citizens.

It is submitted that on the question whether a statute is for the promotion of the general welfare, the considerations are the same, whether the statute professes to be enacted pursuant to a general constitutional mandate or pursuant to an exercise of the police power, to promote the general welfare. In either case, if specific authorization for the enactment of the statute be not found in the Constitution, there must be a reasonable necessity for attaining the end which

the statute has in view and the method devised to attain the end must be reasonable (see Division C of this part of the brief).

It is submitted that the survival of democratic institutions is less jeopardized by a centralization of control under a representative form of government, in matters involving the welfare of the entire people of the United States, than by the confusion and futility incident to leaving such matters to be dealt with, haphazardly and inefficiently or not at all, as the case may be, by forty-eight States each acting by itself.

B.

These taxes manifest an exercise of the power conferred upon Congress by Clause 1 (the tax clause) of Section 8 of Article I of the Constitution.

(1) If the Constitution contains a general authorization to Congress to lay and collect taxes to provide for the general welfare, the power of Congress to tax to that end lies in the very letter of the Constitution. The Preamble to the Constitution states the general purpose of the document and charts a general course for the government organized under the document. The Preamble states, in effect, that such purpose is and such course should be, to *promote* the general welfare, and in Article I Congress is authorized to raise funds to *provide* for pursuing such course and carrying out the said purpose.

Concerning the general-welfare purpose expressed in the preamble to the Constitution, the following questions are in order: Is that the purpose of any particular part of the Constitution, or is it the purpose of the Constitution as a whole? Is it the purpose of Article I but not of Article II or Article III of the document? Is it the purpose of the

articles but not of the amendments? Or vice versa? Then can it be the purpose of one *clause* but not of another? Or is it the purpose of *every* clause of the instrument? Is it not the purpose of every *word* of the instrument? Of every comma, every semicolon, every dash, every period? Is it not, in short, the purpose of the instrument as a whole and shall not the instrument as a whole be so interpreted as to give effect to that purpose at all times?

See *Holmes v. Jennison*, 14 Pet. 540, bot. 570.
Also *Commonwealth v. City of Newport News* (Va.), 164 S. E. 689, 696 (a constitution must be construed "in the light of the purposes for which it was ordained.").

The Constitution must be read and interpreted with the thought in mind that every scintilla of the instrument is with a view to promoting the general welfare of the people of the United States. There is broad scope, then, in the clause which states that the Congress shall have power to levy and collect taxes to pay the debts and provide for the common defense and general welfare of the United States. There is harmony between the welfare-purpose clause of the Preamble and the general-welfare phrase of the tax clause. The one states a general purpose and furnishes a criterion for the construction of the instrument as a whole; the other imposes a limitation, but upon the taxing power only—that power is not to be exercised *except* to pay debts, provide for the common defense, and *provide for the general welfare.* It is not, for instance, to be exercised to confer upon some individual some exclusively individual benefit, some benefit apart from considerations of common defense or general welfare or the payment, by the Nation, of its debts.

See Burdick, The Law of the American Constitution, sec. 77.

We believe, as Mr. Justice Story believed many years ago that these words "provide for the common defense and general welfare," mean exactly what they say. He said that, "construing this clause in connection with, and as a part of the preceding clause, giving the power to lay taxes, it becomes sensible and operative. It becomes a qualification of that clause, and limits the taxing power to objects for the common defense or general welfare. It then contains no grant of any power whatsoever; but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation."

Story, Commentaries on the Constitution, 5th ed., sec. 911.

Mr. Justice Story said, also: "* * * No person has a right to assume, that any part of the Constitution is useless, or without a meaning; and *a fortiori* no person has a right to rob any part of a meaning, natural and appropriate to the language in the connection in which it stands. Now, the words have such a natural and appropriate meaning, as a qualification of the preceding clause to lay taxes. Why, then, should such a meaning be rejected?"

Story, Commentaries on the Constitution, 5th ed., sec. 912.

He goes on to say: "It is no sufficient answer to say, that the clause ought to be regarded, merely as containing 'general terms, explained and limited, by the subjoined specifications, and therefore requiring no critical attention, or studied precaution;' because it is assuming the very point in controversy, to assert, that the clause is connected with any subsequent specifications. It is not said, to 'provide for the common defense, and general welfare, *in manner following, viz.,*' which would be the natural expression,

to indicate such an intention. But it stands entirely disconnected from every subsequent clause, both in sense and punctuation; and is no more a part of them, than they are of the power to lay taxes. Besides, what suitable application, in such a sense, would there be of the last clause in the enumeration, viz., the clause 'to make all laws, necessary and proper for carrying into execution the foregoing powers, etc.?' Surely, this clause is as applicable to the power to lay taxes, as to any other; and no one would dream of its being a mere specification, under the power to provide for the common defence and general welfare."

Story, Commentaries on the Constitution, 5th ed., sec. 913.

The use for which the Gettysburg battlefield was taken by the United States through the exercise of the power of eminent domain, was spoken of by Mr. Justice Peckham as "one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country." And he said: "No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them may be drawn that the power claimed has been conferred."

United States v. Gettysburg Electric Ry., 160 U. S. 668, 680.

Neither should a narrow view of the character of the purposes involved in the Agricultural Adjustment Act be taken, and there is no less reason, in connection with providing

for the *general welfare* through the exercise of the power of taxation, than in connection with taking property for a *public use* through the exercise of the power of eminent domain, to say that the power to effectuate certain purposes must "be plainly and unmistakably deduced from any of the particularly specified powers," but, in the one matter as in the other, if such particularly specified powers must be looked to at all, such powers in any number "may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred."

It is submitted that Warren is correct in saying: "This decision taken in connection with the *Debs Case,* showed that the Court was practically prepared to support any action taken by the National Government and reasonably necessary for its self-preservation and welfare."

2 Warren, The Supreme Court in United States History (1926 ed.), p. 706.

It is the belief of the undersigned that when the Court, so far as what constitutes a public use is concerned, predicated its decision upon no particular clause of the Constitution but upon the comprehensive effect of an indefinite number of its clauses, the Court came very close to, if it did not actually arrive at, the point of regarding the promotion of national benefit (the benefit of the nation as a whole) as within a general power of Congress.

(2) "While, however, the so-called National police powers may be restricted under the Commerce Clause, it is to be noted that there seems to be very little restriction on the extent to which the National Government may regulate, under the taxing power, the production, manufacture, sale and transportation of articles within the States. As early as 1869, it was held, in *Veazie Bank v. Fenno,* 8 Wall. 533, that the taxing power might be exercised for the purpose

of destroying or regulating the thing taxed; and in 1904, this doctrine received further affirmation in the decision in *McCray v. United States,* 195 U. S. 27, involving the Oleomargarine Act. The number of subjects, the manufacture and sale of which Congress has regulated in great detail is large and constantly increasing, of which the following statutes are an example—Oleomargarine Acts of 1886 [24 St. 209] and 1902 [32 St. 193]; the Filled Cheese Act of 1896 [29 St. 253]; the Mixed-Flour Act of 1898 [30 St. 467]; the White Phosphorus Match Act of 1912 [37 St. 81]; the Harrison Narcotics Act of 1914 [38 St. 785]; the Cotton Futures Act of 1916 [39 St. 476]."

2 Warren, The Supreme Court in United States History (1926 ed.), p. 738.
See also Burdick, The Law of the American Constitution, sec. 78.

In other words, if Congress may not achieve a certain result under the commerce clause, Congress may nevertheless, pursuant to the rulings of the Court, achieve a similar result by imposing a tax (note that we say tax, not penalty).

See *infra,* II C (2).

Congress may, if it see fit, destroy agriculture or processing or both, by the exercise of the power of taxation, and the motives of Congress, in the destruction of a thing, by the exercise of that power, are not the subject of judicial inquiry.

See *infra,* II C (1) (2).

If the processing tax were so onerous as to destroy the processing of agricultural products, a matter of legislative policy rather than a matter of judicial inquiry would be presented. And if Congress can destroy something by the

exercise of the power of taxation, may not Congress save or improve something by the exercise of the same power? Particularly if Congress has power to lay and collect taxes to provide for the national welfare? Moreover, must Congress act directly upon a thing to destroy it or to save or improve it? May not Congress tax processing to save agriculture? Surely, it has never been the intent of Congress to destroy processing. But suppose such were the intent. Congress would be the judge of what the answer to each of these questions would be: Does the national welfare hinge more upon what happens to the farmers than upon what happens to the processors? Does the interest of the consumer lie in having the benefit of a large volume of agricultural commodities at low prices or in having the benefit of the preservation of the soil of the agricultural areas, and the preservation of a home-owning, farm-owning agricultural population?

(3) If the processing taxes and the floor stocks taxes can not be justified under the tax clause, may the protective tariff be justified under that clause? The protective tariff is not a tariff for revenue only, just to pay the debts of the United States or to provide for its defense. Consequently the objective of the protective tariff must be to provide for the general welfare. If the protective tariff contemplates, and provides for, the general welfare, why do not the processing taxes and the floor stocks taxes equally if not better contemplate, and provide for, that welfare? The protective tariff, like a processing tax or a floor-stocks tax in conjunction with rental and benefit payments, operates through the law of supply and demand. If it is for the general welfare to cut down the foreign supply of certain commodities by means of a tariff, for the avowed purpose of enabling American manufacturers and producers of such commodities to

obtain higher prices for them than could be charged for them in the absence of protection, it may equally or better be for the general welfare to cut down, by means of rental and benefit payments out of funds raised by means of processing taxes and floor-stocks taxes, the supply of certain domestic agricultural products, so that the farmer may receive for them, not less than what it costs him to produce them, but the cost of producing them plus enough to put the prices for which he sells them on a parity with the prices of the things he buys.

If the Constitution as a whole is not a general mandate to Congress to legislate for the promotion of the common good of the national people or if the tax clause of Section 8 of Article I of the Constitution does not confer upon Congress a general power to lay and collect taxes, duties, imposts and excises to provide for the general welfare, the question may be raised concerning protective duties, as well as concerning processing and floor-stocks excises, whether Congress has power to lay them.

If it be urged that the general welfare for which Congress may provide by the exercise of the power of taxation must lie along some line or lines indicated by some particular power or powers more specifically conferred, does the contention that Congress has power to enact protective tariff laws resolve itself into the contention that the *commerce* clause of said section 8 authorizes the passage of such laws? The key word in the commerce clause is *regulate*. The object of a protective tariff is to promote domestic production, protect the prices of domestic commodities, protect capital invested in domestic enterprise and labor engaged therein. This throws us back upon considerations

of general welfare. There is significance in the very word *protective.*

See *Field v. Clark,* 143 U. S. 649, 696.
See also *Child Labor Tax Case,* 259 U. S. 20, bot. of 24.

Ours has been called a constitution "that has known protective tariffs for a hundred years."

Alaska Fisheries Co. v. Smith, 255 U. S. 44, 48.

Yet it can hardly be argued that anything becomes constitutional by mere lapse of time. We could not argue that if the processing taxes and the floor-stocks taxes were to go unchallenged for a century, they would at the end of that period be constitutional, without regard to what if any foundation may be found for them in the Constitution. And it is submitted, and urged, that the foundation for them along with any foundation there may be for protective tariffs, lies primarily in consideration of general welfare, and that protective duties and the processing and floor-stocks excises must alike stand or fall by reference to the same clause or clauses of the Constitution.

Since the decision in *Alaska Fisheries Co. v. Smith,* a case has been decided in which reasons are given for the constitutionality of protective duties.

J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394.

"* * * It is enough to point out that the second act adopted by the Congress of the United States, July 4, 1789, Ch. 2, 1 Stat. 24, contained the following recital.

" 'Sec. 1. Whereas it is necessary for the support of the government, for the discharge of the debts of the United States, and the encouragement and protection of manufac-

tures, that duties be laid on goods, wares and merchandise imported: Be it enacted, etc.'

"In this first Congress sat many members of the Constitutional Convention of 1787. The Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. *Myers v. United States,* 272 U. S. 52, 175, and cases cited. The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history."

J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394, 411-12.

And see suggestion of counsel in *Hill v. Wallace,* 259 U. S. 44, 53: "The protective tariff was then an established system in England and elsewhere, and doubtless the Constitution contemplated that in the laying of imposts Congress might fix the duties with a view to excluding importation rather than raising revenue."

In the Tariff Act of 1897, in that of 1909, and in that of 1922, encouragement of industries is stated as among the purposes of the Act.

J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394, 412.

Let us assume that when our Constitution was adopted, the terms "duties" and "imposts," as used therein, must have been intended to include duties or imposts of the protective type. This means, then, that the true foundation for the protective tariff is found in the tax clause, in which the terms "duties" and "imposts" are used, and in which

it is provided that they may be laid and collected to pay the debts of the United States and provide for the common defense and general welfare. In the same clause occurs the word "excises." Excises, too, may be laid and collected to pay the debts of the United States and provide for the common defense and general welfare. It is as if the clause read thus: "To lay and collect taxes, protective and other duties and imposts, and protective and other excises, to pay the debts of the United States and provide for the common defense *and general welfare.*" There is an analogy between a duty or impost and an excise. There is, too, an analogy between an impost laid to provide protection and an excise laid to provide for protection, and if the one is constitutional because it was in the thoughts of the founding fathers, its analogue should be deemed a thing which they would have considered equally constitutional, if it, also, had been in their thoughts.

Protective duties are imposed upon the importation of commodities in order to affect the supply and the prices thereof in the interests of general welfare; processing and floor-stocks excises are also laid in the interests of general welfare, as the revenues raised through these excises are or may be used to finance certain voluntary efforts of farmers which in the aggregate so affect the supply of certain agricultural commodities as to adjust that supply to the effective demand for those commodities and produce proper price levels therefor. Between affecting one supply by duties on imports and affecting the other supply through such voluntary co-operative efforts, financed through excises on processing, there is no fundamental difference of purpose and effect. Whether the tax itself affects the supply, as in the case of the protective tariff, or is used to finance a program whereby the supply is affected, can make no

difference between the fundamental equities of those immediately benefited through protective tariffs, and those directly benefited by rental and benefit payments, or through subserving the general welfare through protection, on the one hand, of those helped through the protective tariff, and protection, on the other hand, of those helped by rental and benefit payments. If such a difference does not exist in fundamentals, can it be that the Constitution has been so drawn and must be so interpreted that Congress can provide for the one thing and not for the other?

(4) Even if the rental and benefit payments provided for by the Agricultural Adjustment Act were unconstitutional, the excises provided for by sections 9 and 16 of the Act would nevertheless be valid.

Certain provisions of the Act indicate that Congress would have imposed these excises apart from the agricultural program for which the Act provides. Nothing in the Act is to the effect that funds raised through these taxes may not ultimately be appropriated to other purposes. The existence of the economic emergency has been recognized in numerous acts and in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398. Processing and floor-stocks taxes go into the general fund of the Treasury, whence they may be appropriated to finance any of the Acts in question. The Agricultural Adjustment Act provides:

> "Section 19. (a) The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.
>
> "(b) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, in so far as applicable and not inconsistent with the provisions

of this title, be applicable in respect of taxes imposed by this title: * * *

"(c) * * *."

Moreover, the Act provides (see section 14 thereof): "If any provision of this title is declared unconstitutional, * * * the validity of the remainder of this title * * * shall not be affected thereby."

Congress has not permitted the validity of these excises to depend upon whether the agricultural features of the Act are constitutional, nor has Congress foreclosed itself from appropriating to any permissible purposes the revenues which these excises produce. On the one hand the Act does not appropriate revenues to any purpose other than a public one; on the other hand, as every legislative act is clothed with a strong presumption of its constitutionality, it must be presumed that any act appropriating or re-appropriating these revenues will devote them to purposes to which they may be constitutionally applied. Congress may even use these revenues in connection with moral obligations.

Appropriations may be made to discharge purely moral obligations as well as to discharge those obligations which are legal. *United States v. Realty Co.*, 163 U. S. 427, 437 *et seq.*

We contend that the millions of agreements which the farmers have made with the Secretary of Agriculture, respecting reduction in acreage and reduction in production for market, represent legal obligations—the Secretary promises payments and the farmers promise these reductions. Obviously the reliance of millions of farmers upon the validity of these agreements will have created a moral oblgation on the part of the United States, in the event that such agreements are declared unconstitutional.

C.

The purposes of the Act as a whole, if not otherwise warranted, are justified by the existence of economic conditions constituting an occasion for the exercise of the national police power.

(1) Under the tax clause, the commerce clause and the post-roads clause, a broad national police power exists, as against which State legislation, however strong the desire to uphold it may be, is upheld only when it can be "construed as no interference with the authority of the National Government."

See 2 Warren, The Supreme Court in United States History (1926 ed.), p. 739.

It is submitted that the police power of the Nation extends beyond the confines of the tax clause, the commerce clause and the post-roads clause.

In connection with a discussion of the national police power, the contents of B (3), *supra,* and both II C and II D, *infra,* are in point. We here discuss the power in connection with, primarily, the matter of rental and benefit payments, our contention being that the processing and floor-stocks taxes, so far as laid and collected with rental and benefit payments in mind, are laid and collected in behalf of a welfare for the protection of which the police power of the Nation may be exercised.

It has been said that "the invocation and application of the 'police power' is nothing more than an appeal to the sociological method of interpreting our constitutions and laws."

Drake, The Sociological Interpretation of Law, 16 Michigan Law Review, 599, 614.
And see 2 Warren, The Supreme Court in United States History, (1926 ed.), p. 740.

The object of the police power, like that of the Constitution, is the promotion of general welfare. "* * * When, in the last decade of the nineteenth century, it [the Court] took the radical step of expanding the old classic phrase defining the objects of the exercise of the police power—'public health, safety and morals'—by interpolating the words 'public welfare,' it advanced far toward acceptance of the theory of modern sociological jurists that the law must recognize the priority of social interests, and that it must start from the premise that 'individual interests are to be secured by law, because and to the extent that they are social interests.' * * *"

2 Warren, The Supreme Court in United States History (1926 ed.), p. 744.

Possibly the next great step lies in the clear recognition of the fact that the true boundary between the rights of States and the rights of the Nation lies along the line of cleavage between what is and what is not of national import and concern.

As to the Tenth Amendment: "We must consider what this country has become in deciding what that Amendment has reserved."

Missouri v. Holland, 252 U. S. 416, 434.

The Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

What people? Clearly, the people of the United States. A citizen of the United States has a dual citizenship; in point of citizenship, he has two capacities; in one of these he is a member of the people of a State; in the other, a member of a people undivided by state lines. He is at once the

citizen of a "country," so to speak, whose boundaries are "state lines," and the citizen of an undivided and indivisible country whose only boundaries are national. If "We the people of the United States" are "the people" to whom are reserved some of the powers not delegated by the Constitution, what are the undelegated powers so reserved to us? Do they not include the power to act in a manner which, being appropriate under our frame of government, shall promote our general welfare? That certainly includes the police power of the people, to be used in their behalf, on occasion, by Congress.

The Constitution nowhere clearly defines the powers reserved to the States or the powers reserved to the people of the United States, but it is respectfully submitted that the tenor of the document as a whole is to the effect that matters of federal import or concern are matters of federal cognizance, and that power in these matters, so far as not otherwise touched upon in the Constitution, is reserved to the people of the United States. The Constitution was not the act of the States, but the act of the people of the United States; the act was that of a single people that under the Articles of Confederation existed as the people of the United States before the Constitution was adopted.

Scott v. Sandford, 19 How. 393, 404;
Martin v. Hunter, 1 Wheat 304, 324;
Chisholm v. Georgia, 2 Dall. 419, 470;
Barron v. Baltimore, 7 Pet. 243, 247.

The Tenth Amendment should be read in connection with the Ninth Amendment.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Constitution of the United States, Ninth Amendment.

If "the people" mentioned in the Tenth Amendment is the people of the United States, it would seem that the Ninth Amendment insures certain rights to the national people.

Holmes v. Jennison, 14 Pet. 540, 557.

The police power, a power *reserved* to the people (Tenth Amendment) is among these rights, and in its very nature is one that on occasion the people exercise through the legislative branch of the government.

"As applied to the powers of the states of the American Union, the term is also used to denote those inherent governmental powers which, under the federal system established by the constitution of the United States, are reserved to the several states."

12 C. J., Const. Law, sec. 412.
And see *Home Building and Loan Assn. v. Blaisdell,* 290 U. S. 398, 444.

See also *Des Moines v. Manhattan Oil Co.,* 193 Iowa 1096, 1103, 184 N. W. 823, 826-7, 23 A. L. R. 1322 (police power spoken of as a "reserve element of sovereignty").

If under the Tenth Amendment the powers reserved to the several States are those inherent governmental powers which constitute the police power, then under the Tenth Amendment the powers reserved to the people of the United States are likewise such inherent governmental powers as constitute the police power. We can not escape the significance of the word "reserved" as used in the Tenth Amendment. To the people of the United States as a whole, as well as to the several States, powers are *reserved.*

See *Kansas v. Colorado,* 206 U. S. 46, 90.

"Under the American constitutional system, the police

power, being an attribute of sovereignty inherent in the original states, and not delegated by the federal constitution to the United States, remains with the individual states * * *"

12 C. J., Const. Law, sec. 417.

Any statement such as the foregoing overlooks the significance of the words "reserved * * * to the people" in the Tenth Amendment, and should be construed to refer to those matters which do not affect the national people as a whole and do not lie beyond the scope of effective action by a State. Is it not important that matters which genuinely involve the general welfare of the Nation should not be at the mercy of any supposed reservation of power in the States? We do not share the fear mentioned in *Kansas v. Colorado,* 206 U. S. 46, 91, concerning supposed general welfare. If Congress passes and the President approves and the Court upholds an Act, supposition as to whether it is in the interest of a general national welfare should, it would seem, be practically eliminated.

"* * * Within the States Congress may exercise no police power as such, and may affect it only by the enactment of statutes within the powers conferred on it by the Constitution of the United States, either expressly or by clear implication. * * *"

12 C. J., Const. Law, sec. 417.

Any such statement as the foregoing means, merely, that there is a line of demarcation, somewhere, between the police power of a State and that of the people of the United States, and that Congress exercises only the latter, never the former, power. But as to the scope of the powers conferred on Congress by the Constitution, "either expressly or by clear implication," to affect a State (*a fortiori* as to power

so conferred to affect *all* the States and the national people, "the people of the United States," in a matter involving the entire citizenry of the Nation), we must consider the police power as impliedly a part of the Constitution, in the sense of a thing which is by necessity impliedly recognized by the Constitution, inasmuch as the police power and the power of making, changing and amending constitutions, written or unwritten, are parts of the sovereign power of the people, and inasmuch as general welfare is the general object of all manifestations of sovereignty.

It would seem that the case in favor of an exercise of national police power is very strong in a matter which is national on so large a scale that State legislation in the matter, unless in *aid* of national legislation, would be practically futile. And the following things should be noted:

The State can not have its own particular protective tariff, even with consent of Congress. Const., Art. I, Sec. 10, Cl. 2. Nor may several States in which lie the sources of supply of a given commodity achieve price parity for it by making arrangements therefor with one another, as no State may enter into any agreement or compact with another State. Const., Art. I, Sec. 10, Cl. 3. Nor can the State dispose of its surplus products to a foreign nation through the medium of a treaty with such nation. Const., Art. I, sec. 10, cl. 3. So far as regulation of the value of money may be involved in the matter of achieving price parity for agricultural commodities, the State is helpless. Const., Art. I, Sec. 10, cl. 1.

It would seem that with regard to the police power of the Nation, the principles operative within the sphere within which the power exists are identical with those operative within the sphere within which the police power of a State exists, and that, therefore, to paraphrase the statement of

a famous author and adopt the statement of a famous judge, "a law purporting to be enacted for the protection of the public will not be declared invalid, unless it shall be made clear to the Court that it was not open to Congress to find that it had a real or substantial relation to the protection of the public health, safety, morals or welfare, or unless it is so clearly arbitrary or oppressive, or (as Judge Holmes has said) 'so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions.' "

See 2 Warren, The Supreme Court in United States History, (1926 ed.), p. 745, which cites:
Muller v. Oregon, 208 U. S. 412;
Broadnax v. Missouri, 219 U. S. 285;
Chicago, etc., R. R. v. McQuire, 219 U. S. 549;
German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

In connection with due process this has been said: "Only in those cases in which it is obvious beyond peradventure that the statute was the result, either of passion or of ignorance or folly, can the Court say that it was not due process of law. In this way, the principle may be observed that with the expediency of the statute the Court has no concern, but only with the power of the Legislature."

Learned Hand, Due Process of Law and the Eight Hour Day, 21 Harvard Law Rev. 495, 500.

It can hardly be true that it was not open to Congress to find that agricultural rental and benefit payments have a substantial relation to the protection of the general welfare of the Nation. Nor are the contracts or other consensual arrangements involving such payments so clearly arbitrary or oppressive or so unreasonable and far beyond the necessities of the case as to be deemed a purely arbitrary

interference with the business of agriculture. Nor is it obvious beyond peradventure that the Agricultural Adjustment Act is the result of passion or the result of ignorance or folly. On the contrary, it bears the earmarks of deliberation and shows upon its face that it is the offspring of existing conditions requiring legislative action.

(2) The Agricultural Adjustment Act embodies a conservation program. Rental payments in connection with corn-production involve reduction of the acreage planted to corn. See sec. 8(1). Reduction of the corn acreage involves resting the soil from corn-production, compelling, to a certain extent, a soil-conserving rotation of crops. We have all witnessed the waste of our forests and the waste of many other natural resources. What about wasting the soil? It is common knowledge that the same sort of crop, taken from the same soil year after year, takes the same elements from the soil year after year, and in time so far robs the soil of those elements that it will no longer produce that same sort of crop. It is common knowledge, too, that no matter how deep the soil may be, the depth to which a plow will go is limited. If the corn belt is a national asset because it produces corn, we had better keep its soil fit for corn production. If the cotton belt is a national asset because it produces cotton, we had better keep its soil fit for cotton production. Unlimited production in these belts is not only ruinous to farm prices but ruinous to the soil, which is a great national asset. In the interest of soil conservation, a limitation and regulation of the production of certain agricultural commodities is a paramount necessity. Once the corn belt or the cotton belt or any other great area especially suited to the production of some particular crop is destroyed, other things remaining equal, buying power will fall to extremely low levels in that area, and the industrial sections of the United

States will suffer along with the agricultural area in question.

To justify the exercise of the police power in the matter of conservation of the soil, it is not necessary that the Act state either that it is enacted in the exercise of that power or in the interest of soil-conservation. It is enough that the occasion for conserving a natural resource is so obvious that it may be judicially noticed. It is submitted that although emergency legislation of the police-power sort often makes reference to emergency, police-power legislation need not in terms refer to the power that renders it valid.

23 C. J., Evidence, secs. 1810 and 1860.

Clearly, the conservation of a natural resource extending over several states is beyond the pale of State action, and presents a national problem, which only national legislation can solve. What can Iowa, singlehandedly, effectively do to conserve the national asset known as the corn belt, which extends eastward from Iowa into Illinois, westward from Iowa into Nebraska, northward from Iowa into South Dakota, southward from Iowa into Missouri? Iowa may not even enter into a crop-rotation or other compact with these other states, to conserve this entire vast national resource in behalf of the people of the United States.

Constitution, Art. I, Sec. 10, Cl. 3.

The Agricultural Adjustment Act is a program for the co-operative efforts of free men in an undertaking of national import and concern. It is submitted, however, that the object of the undertaking is such, in its bearing on the general welfare of the Nation, that coercive measures, within reasonable limits, in furtherance of that object, by the exercise of the police power, would not be out of order, if

the situation required them. It is an old saying that one man's liberty ends where another man's liberty begins. The point where one man's liberty ends and another man's liberty begins is precisely the point at which considerations of general welfare arise. Nor, inasmuch as such measures, under our American form of government, must run the gamut of legislative enactment, presidential approval and judicial scrutiny, need we fear to employ them in the advancement of the general welfare. Unless they are reasonably necessary, and reasonable in method, they will not run the gamut.

See *American Coal Mining Co. v. Special Coal and Food Commission of Indiana,* 268 Fed. 563, 570; appeal dismissed, 248 U. S. 632.
See *Nebbia v. New York,* 291 U. S. 502, 525.

In *Schechter v. United States,* it is said that the plan of the National Industrial Recovery Act "is not simply one for voluntary effort" but "involves the coercive exercise of the law-making power," binding, if valid, "equally those who assent and those who do not assent."

Schechter v. United States, 79 L. Ed. 888, 894.

But the plan of the Agricultural Adjustment Act *is* simply a plan for voluntary effort—a plan for "a broad and intensive co-operative effort by those engaged" in agriculture (we employ an adaptation of language used in the Schechter case); nor does it subject agriculture to "the coercive exercise of the law-making power" or bind "equally those who assent and those who do not assent." Under the Agricultural Adjustment Act, a person enters into a contract or other consensual arrangement with the government, and voluntarily subjects himself to the rules and regulations pertinent to such contracts or arrangements. It can

be no less true of the rights of the individual than of the powers of a State, that they are not invaded by a statute which "imposes no obligation but simply extends an option," an option the State or the individual, as the case may be, is free to accept or reject.

Massachusetts v. Mellon, 262 U. S. 447, 480.

Nor would it seem that the United States invades the rights of a State by making contracts with those inhabitants of the State who are qualified for and desirous of making such contracts, in a matter vital to the welfare of the Nation.

The arguments we advance warrant the Agricultural Adjustment Act as the embodiment of a long-time program. That the existing economic emergency justifies the Act, under the police power, as a short-time program, for the reasons stated in the Act itself, seems too clear for argument. "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal current of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

See the Declaration of Emergency, at the beginning of said title I.

An emergency is not a source of power, but beyond question is an occasion for the exercise of power.

Schechter v. United States, 79 L. Ed. 888, 894, citg.
Ex parte Milligan, 4 Wall. 2, 120, 121, and
Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 426.

That an emergency affecting agriculture exists is likewise beyond question, as the Court may judicially notice.

The Court judicially notices matters of common knowledge.

23 C. J., Evidence, sec. 1810.

The Court judicially notices presidential proclamations and the contents thereof.

23 C. J., Evidence, sec. 1900.

The Court not only judicially notices acts of Congress (including, of course, what those acts state concerning the emergency and concerning agriculture), 23 C. J., Evidence, 1947, but all allusions to those matters in the Congressional Record.

23 C. J., Evidence, sec. 1934, and footnotes, particularly f. n. 95 (a, 4).

It has been *held* that a court may judicially notice the existence of a public emergency.

Block v. Hirsch, 256 U. S. 135, 154.

D.

In connection with the force and effect of the general-welfare purpose stated in the Preamble, and the general-welfare provision of Clause 1 of section 8 of Article I of the Constitution, the last clause of said section should be considered:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

The force and effect of the clause just quoted is to enlarge congressional powers.

Several broad, interesting and instructive statements have been made with respect to this clause.

McCulloch v. Maryland, 4 Wheat. 316, 415.
Legal Tender Cases, 12 Wall. 457, 531 *et seq.*
Legal Tender Cases, 110 U. S. 421, 440.

"We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section 8 of the first article, and granted in the same words in which all other powers are granted to Congress."

Legal Tender Cases, 12 Wall. 457, 550.

In the light of such remarks, what of the power to lay and collect taxes, duties, imposts and excises to provide for the general welfare of the United States?

Nor need that which is necessary and proper to such welfare be absolutely and indispensably necessary thereto. The words "necessary and proper" cover "all appropriate means which are conducive or adapted to the end to be

accomplished, and which in the judgment of Congress will most advantageously effect it."

Legal Tender Cases, 110 U. S. 421, 440.
And see *McCulloch v. Maryland,* 4 Wheat. 316, 413.

In the latter case we read: "* * * The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adopted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur."

McCulloch v. Maryland, 4 Wheat. 316, 415.
And see *Legal Tender Cases,* 12 Wall. 457, bot. 531 *et seq.*

If from the Preamble, the tax clause and the last clause of said section 8, a power to act in behalf of the general welfare does not exist, to the extent necessary to render the Agricultural Adjustment Act constitutional, we are at a loss to account for the constitutionality of many things that have been held to be, else are habitually regarded as, constitutional.

The undersigned is not among those who believe that this Court is without the sanction of the Constitution in declaring laws unconstitutional. A written Constitution, like any other legal document, has to be interpreted and construed. The interpretation and construction of a legal document is naturally a judicial function. Obviously, the three branches of our government—the executive, the legislative and the judicial—can not each be the final arbiter of questions of constitutionality. If all three branches had power to pass upon the question of the constitutionality of a statute, we would long ago have had, not that justice which the Constitution was adopted to establish or that domestic tranquility which it was adopted to insure, but unbearable inequality and endless disturbance. So the power impliedly vested in this Court, to declare whether a law is constitutional, is in line with the general-welfare object of the Constitution—an object expressed in its Preamble and exhibited by the document as a whole. But the point apropos to this brief is, whether the argument that sustains the power of Congress to pass such an act as the Agricultural Adjustment Act is any the less clear as a power of Congress than the power to declare a law unconstitutional is clear as a power of this Court.

We can construe the Constitution liberally enough to provide for various things which it does not mention. We can, for instance, construe it liberally enough to provide for national banks and federal reserve banks. We could undoubtedly construe the Constitution liberally enough to justify the Louisiana Purchase and other like purchases of territory. May we not construe the Constitution liberally enough to enable us to achieve an equality between agriculture and other industries, and a parity between the prices of agricultural and those of nonagricultural commodities?

II.

Sections 9 and 16 of the Agricultural Adjustment Act, C. 25, 48 Stat. 31, contravene none of the limitations which the Constitution places upon congressional action.

A.

Neither the processing taxes nor the floor-stocks taxes are within the following prohibition of the Constitution:

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

Constitution, Article I, sec. 9.

A tax upon processing is not a tax upon ownership or upon a thing owned but a tax upon something occurring (e. g., processing or selling) in connection with the thing, and so is an excise, which is never regarded as a direct tax.

Tyler v. United States, 281 U. S. 497, 502;
Y. M. C. A. v. Davis, 264 U. S. 47;
Edwards v. Slocum, 264 U. S. 61;
Billings v. United States, 232 U. S. 261, 279;
Stanton v. Baltic Mining Co., 240 U. S. 103, 114;
Flint v. Stone Tracy Co., 220 U. S. 107;
Thomas v. United States, 192 U. S. 363;
Knowlton v. Moore, 178 U. S. 41;
Murdock v. Ward, 178 U. S. 139;
Nicol v. Ames, 173 U. S. 509;
Scholey v. Row, 23 Wall. 346;
Hylton v. United States, 3 Dall. 171.

In fact, in a case decided in 1913, the Court might easily have referred to a certain excise as a "processing tax."

See *Stratton's Independence v. Howbert,* 231 U. S. 399, top of 415.

As to the floor-stocks taxes, it is to be noted that subsection 16(a') does not impose them on stocks not held for *sale* or *other* disposition, *other* disposition meaning, of course, as subsection 15(b) indicates, some disposition in the nature of or analogous to a sale. These taxes are with reference to that which is presumably to occur in connection with such stocks, and, under the same section, when and if a processing tax is discontinued on the basic commodity from which given floor stocks have been processed, a rebate is allowed on any tax which under subsection 16(a) may have been paid on such floor stocks. The rebate, necessarily, is upon the basis of so much of such stocks as, at the time of discontinuance of such processing tax, remains *unsold* or otherwise undisposed of. In fact, subsection 16 (a) *in terms* imposes the tax upon "the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied."

In connection with the remarks we have just made, see:

Patton v. Brady, 184 U. S. 608.

As to both the processing and the floor-stocks tax, it is to be noted that a tax the burden of which may be shifted to others by those who pay it is an indirect tax. "Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; * * *"

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 558.
And see Cooley, Taxation (3d ed.) p. 10.
Also 61 C. J., Taxation, sec. 6, f. n. 57.

Finally, as far as the floor-stocks tax is concerned, it is

to be noted that if the processing tax is valid, and is an excise, and the floor-stocks tax is laid to prevent evasion of the processing tax, the floor-stocks tax is also valid, and is an excise. The truth of the statement just made is recognized in principle in several cases.

Tyler v. United States, 281 U. S. 497, 505 (citg. *Taft v. Bowers,* 278 U. S. 470, 482);
District of Columbia v. Brooke, 214 U. S. 138, 150;
Milliken v. United States, 283 U. S. 15, 23, 24-25.

B.

Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that the excises they impose are not uniform throughout the United States.

In connection with the question whether these excises are uniform, it is to be borne in mind that the Constitution requires, merely, that duties, imposts and excises must be uniform "throughout the United States." That is to say, the Constitution requires geographical uniformity in the imposition of duties, imposts and excises. "The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts and excises laid by Congress is the territorial uniformity required by Art. I, 8. *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429, 557; *Knowlton v. Moore,* 178 U. S. 41, 98, 106; *Flint v. Stone Tracy Co.,* 220 U. S. 107, 150; *Billings v. United States,* 232 U. S. 261, 282; *Brushaber v. Union Pacific R. R. Co.,* 240 U. S. 1, 24."

LaBelle Iron Works v. United States, 256 U. S. 377, 392.

That the processing tax on any given commodity or the floor-stocks tax on any given article is uniform "through-

out the United States" can hardly be gainsaid. On the processing of a hundred pounds of hogs the tax is the same in California as it is in Maine. The same, too, in California as in Maine, is the floor-stocks tax on any article processed, wholly or in chief value, from hogs.

Congress has power to establish "uniform laws on the subject of bankruptcies throughout the United States."

Constitution, Art. I, Sec. 8, Cl. 4.

In connection with the provision that laws on the subject of bankruptcies must be uniform, as in connection with the provision that duties, imposts and excises must be uniform, the phrase "throughout the United States" connotes a geographical uniformity.

Leideigh Carriage Co. v. Stenzel, 95 Fed. 637.

Therefore the phrase "throughout the United States" does not mean that all persons within the United States shall be embraced within an act that may be passed only subject to a provision that it shall apply uniformly "throughout the United States," but simply that the Act shall apply everywhere in the United States and in the same manner to all who come within its terms.

See *Patton v. Brady,* 184 U. S. 608, 622.

The excise on the processing of cotton applies thus, and the corresponding excise on articles processed, wholly or in chief value, from cotton. The excise on the processing of hogs so applies, and the corresponding excise on articles processed, wholly or in chief value, from hogs.

Geographical uniformity with respect to processing taxes and floor-stocks taxes is less debatable than is geographical uniformity with respect to bankruptcy laws. The operation

or working of these taxes is the same in all parts of the United States. The operation or working of the bankruptcy law is not the same in all the States, yet that law, in terms applicable to them all and taking no distinction, making no discrimination, among them, is not invalid because the application of the law actually works out differently in different States.

Darling v. Berry, 13 Fed. 659.

The Supreme Court has sanctioned the principles here laid down.

Hanover National Bank v. Moyses, 186 U. S. 190;
Stellwegen v. Clum, 245 U. S. 605.

C.

These excises do not contravene the Fifth Amendment.

No person is to be "deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution, Fifth Amendment.

(1) The Fifth Amendment is not a limitation upon the Nation's power of taxation. "So far as the due process clause is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by limitations of the due process clause. *Treat v. White,* 181 U. S. 264; *Patton v. Brady,* 184 U. S. 608; *McCray v. United States,* 195 U. S. 27, 61; *Flint v.*

Stone Tracy Co., supra, 220 U. S. 107; *Billings v. United States*, 232 U. S. 261, 282."

Brushaber v. Union Pacific Rd. Co., 240 U. S. 1, 24. See also *United States v. Bennett*, 232 U. S. 299, bot. 307, and f. n. vi on 308.

A business may be destroyed by taxation without violation of the clause. "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. *McCray v. United States*, 195 U. S. 27. See *Quong Wing v. Kirkendall*, 223 U. S. 59; *Mugler v. Kansas*, 123 U. S. 623; *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 482."

Alaska Fisheries Co. v. Smith, 255 U. S. 44, 48. And see:
McCulloch v. Maryland, 4 Wheat. 316, 431.

It has been said that "* * * the judicial cannot prescribe to the legislative departments of the government the limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the Courts, but to the people by whom its members are elected. So if a particular tax bears mainly upon a corporation or a class of corporations, it cannot, for that reason, be pronounced contrary to the Constitution."

Veazie Bank v. Fenno, 8 Wall. 533, 548.
And see *Child Labor Tax Case*, 259 U. S. 20, 40.

The Court has held that where duties were imposed illegally, under executive order, and imposition of those duties was afterward ratified by an Act of Congress, the act did not violate the due process clause of the Fifth Amendment—

not even with respect to duties as to which, when the act took effect, persons who had paid them had an action pending to recover them.

United States v. Heinszen, 206 U. S. 370, 386, *et seq.*

(2) In connection with the matter of due process under the Fifth Amendment, it is to be borne in mind that the processing and floor-stocks taxes are not taxes in name only, but taxes in reality, of the sort known as excises. They are obviously not penalties under the guise of taxes, hence do not constitute in effect a confiscation under that guise, but are bona fide exertions of the power to tax, designed to raise revenues for national purposes. And, the tax being genuine, the motive for imposing it is immaterial.

Magnano Co. v. Hamilton, 292 U. S. 40 *et seq,* esp. bot. 47;
Tyler v. United States, 281 U. S. 497, 504;
Regal Drug Corporation v. Wardell, 260 U. S. 386, bot. 391.
Lipke v. Lederer, 259 U. S. 557.
Alaska Fisheries Co. v. Smith, 255 U. S. 44, 48-49;
McCray v. United States, 195 U. S. 27;
In re Kollock, 165 U. S. 526, bot. 536.

A difference between, on the one hand, an excise, however great, on the processing of a commodity or upon the sale or other disposition of an article, and, on the other hand, what is obviously a heavy penalty upon a departure from a detailed standard of conduct, is to be noted.

Child Labor Tax Case, 259 U. S. 20, 36, 42.

Sections 9 and 16 of the Agricultural Adjustment Act do not attempt to enforce a standard of conduct with respect to the processing of any commodity or with respect to the sale or other disposition of any article.

D.

These excises are not invalid on the ground that they contravene the Tenth Amendment.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Constitution, 10th Amend.

We may say of either the processing tax or the floor-stocks tax (or of the whole Agricultural Adjustment Act, for that matter), as was said of a certain treaty, that it "does not contravene any prohibiting words to be found in the Constitution."

Missouri v. Holland, 252 U. S. 416, 434.

See discussion of the Tenth Amendment, *supra,* I C (1).

If these are genuine excises, they are not (we again adopt the language of *Missouri v. Holland,* 252 U. S. 416, 434) "forbidden by some invisible radiation from the general terms of the Tenth Amendment." The provisions of sections 9 and 16 of the Agricultural Adjustment Act involve genuine excises.

See *supra,* II C (2).

"Whilst undoubtedly both the Fifth and Tenth Amendments qualify in so far as they are applicable, all the provisions of the Constitution, nothing in these amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress."

McCray v. United States, 195 U. S. 27, 61.

The implications of the *Child Labor Tax Case,* 259 U. S. 20, are to the effect, and the law is, as shown by the cases

there discussed, that if what is called an excise is in reality such, and not a penalty for a departure from a standard of conduct, then no matter how great the excise or what the act or event on which it is laid, and though apart from the imposition of the excise such act or event is a matter of State cognizance only, the excise does not contravene the Tenth Amendment.

E.

Sections 9 and 16 of the Agricultural Adjustment Act are not invalid on the ground that they attempt to delegate legislative power to the executive branch of the government.

(1) The difficulty involved in the matter of delegation of power is in applying rather than in laying down the principles by which to determine whether a delegation of power is constitutional.

State v. Public Service Commission, 94 Wash. 274, 279, 162 Pac. 523, 525.

The principles in this matter have only recently been laid down by this Court:

"The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

Panama Refining Co. v. Ryan, 293 U. S. 388, 421.
And see *Schechter v. United States,* 79 L. ed. 888, 895.

It does not seem that *findings* must necessarily be upon notice or with the assistance of a fact-finding body.

The Cargo, etc. v. United States, 7 Cranch 382;
Marshall Field & Co. v. Clark, 143 U. S. 649, 693;
J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394, 409-411.

The context of sections 9 and 16 of the Act may be examined in order to ascertain whether they attempt to delegate legislative authority.

Panama Refining Co. v. Ryan, 293 U. S. 388, 416;
Federal Radio Commission v. Nelson Bros. Bond & Mort. Co., 289 U. S. 266, 285.

Section 9 (a) provides: "When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation." Thus he is to make a determination and a proclamation, and after they are made the date on which the tax shall take effect is fixed. The contingency on which a tax shall ensue is not, however, the whim or caprice of the Secretary. The tax upon the processing of a given commodity, except sugar beets and sugar cane, is predicated upon a determination that rental or benefit payments with respect to such commodity are to be made, and this determination, obviously, is to be only upon the existence of such facts, with respect to that commodity, as shall carry out the policy of price parity declared in section 2 of the Act. In the very nature of things, the existence of an occasion to make the determination involves the necessity of a finding of facts warranting the determination—

a finding as to current average farm price of the commodity, and a finding of the purchasing power thereof during the base period.

As to the rate of the processing tax, a standard is set up in section 9 of the Act. Subsection (a) of the section states: "The rate of the tax shall conform to the requirements of subsection (b)." Subsection (b) states: "The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; * * *" Here is a standard, and one that can be adhered to only upon findings of fact. Indeed, subsection (b) proceeds to state an exception in which the ascertainment of facts is mentioned—"except that if the Secretary has reason to believe that the tax at such rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties." It is submitted that the above quoted main clause of subsection (b), no less than the above quoted exception, contemplates action predicated upon a finding of facts.

"For the purposes of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

Sec. 9(c) of the Act.

The ascertainment of current average farm price and fair exchange value, by reference to statistics, is a finding of facts. To say otherwise is to say that business men throughout the United States do not act upon factual findings in predicating their determinations and decisions, in various matters, upon available government statistics of various types and in widely varying fields.

Is it more difficult, under the Agricultural Adjustment Act, to ascertain the difference between the current average farm price and the fair exchange value of a basic agricultural commodity, than it is to ascertain, under the Flexible Tariff Act, the difference between the cost of producing an article in the United States and the cost of producing it in a foreign country? The Flexible Tariff Act was upheld.

J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394.

The delegation of certain broad powers, the same to be exercised "from time to time, as public convenience, interest or necessity requires," was also upheld.

Federal Radio Commission v. Nelson Bros. Bond & Mort. Co., 289 U. S. 266, 279, 285.

Section 9 declares: "Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary *finds* necessary (all italics in this sentence are supplied) effectuate *the declared policy*, be adjusted by him to conform to such requirements." No less when the tax is initially effective than at intervals thereafter, it is submitted, is it contemplated or allowed that the Secretary shall act except according to what he *finds* necessary to effectuate the policy declared.

Section 9(a) further declares: "The processing tax shall

terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: * * *."

It seems fairly to be inferred from the policy of the Act that the discontinuance of the tax at the end of a marketing year is no more to follow from whim or caprice than is the taking effect of the tax at the beginning of a marketing year. Certainly, the marketing year itself, differing as to different commodities, is not a thing which the Secretary invents, but is in the nature of an objective reality.

Under Secion 16 of the Act, the imposition of a floor-stocks tax upon an article follows automatically upon the taking effect of a processing tax with respect to the commodity from which the article is processed, and refund or abatement of such floor-stocks tax follows automatically upon the discontinuance of such processing tax. Therefore, so far as the delegation of power under section 16 is concerned, the validity of the delegation depends upon whether the ninth section of the Act is valid.

(2) In connection with the constitutionality of said sections 9 and 12, as well as in connection with any other part of the Act, the presumption of constitutionality is ever to be kept in mind.

Numerous cases attest the general proposition that any legislative act whatsoever is clothed with a strong presumption of its constitutionality.

It does not devolve upon petitioner to show that these excises are constitutional, but upon respondents to show, if possible, that they are not.

12 C. J., Constitutional Law, sec. 221;
Third Dec. Dig., Constitutional Law, sec. 48.

"In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionalty. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this Court from the foundation of the government."

United States v. Gettysburg Electric Ry., 160 U. S. 668, 680.

(3) Even if sections 9 and 16 of the Agricultural Adjustment Act have involved an undue delegation of power, the excises sought to be imposed by said sections have been legalized and ratified.

Section 21 *(b)* of the Agricultural Adjustment Act, added to the Act by section 30 Public, No. 320, 74th Congress, and approved August 24, 1935, provides:

> "The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or

made prior to the date of the adoption of this amendment."

It has been held that where certain duties were illegally imposed under executive order, the imposition of the duties could become the subject of ratification by congressional act, and so as to affect such duties involved in a suit pending at the time of the ratification.

United States v. Heinszen, 206 U. S. 370. And see:
Graham v. Goodcell, 282 U. S. 409 (decision affected suit pending to recover illegally collected taxes);
Charlotte Harbor & Northern Ry. Co. v. Welles, 260 U. S. 8, 11;
Rafferty v. Smith, Bell & Co., 257 U. S. 226 (decision affected judgments already obtained for amount of taxes illegally collected);
Stockdale v. Atlantic Ins. Co., 20 Wall. 323.

If there is any difference between congressional validation of illegal executive action where such action is solely upon the initiative of the executive branch of the government, as in the Heinszen Case, and congressional validation of illegal executive action where such action is undertaken at the instance of Congress itself, it would seem that illegal action having its causation in a congressional act has the better claim to congressional ratification.

Congressional ratification of illegal executive action is not confined to the matter of taxes. As to the making of contracts and other consensual arrangements involving rental and benefit payments, Congress, if it could have *authorized* what the Secretary of Agriculture has done with respect to these matters, may *ratify* whatever he has done with respect to them.

See *Hodges v. Snyder,* 261 U. S. 600, bot. 602 (statute affected judgment already entered); and
Tiaco v. Forbes, 288 U. S. 549 (statute affected suit pending).

Section 21 (c) of the amended Agricultural Adjustment Act, added to the Act by section 30 of Public, No. 320, 74th Congress, and approved August 24, 1935, provides:

> "(c) The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, as determined, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary, and initiation, if formally approved by the Secretary of Agriculture prior to such date of adjustment programs under section 9 (1) of this title, and the making of agreements with producers prior to such date, and the adoption of other voluntary methods prior to such date, by the Secretary of Agriculture under this title, and rental and benefit payments made pursuant thereto, are hereby legalized and ratified, and the making of all such agreements and payments, the initiation of such programs, and the adoption of all such methods prior to such date are hereby legalized, ratified and confirmed as fully to all intents and purposes as if each such agreement, program, method, and payment had been specifically authorized and made effective and the rate and amount thereof fixed specifically by prior Act of Congress."

We are not to be understood to imply that the Secretary of Agriculture has acted illegally in any respect. No necessity for amendment of the Act by the addition thereto of the provisions of section 21 is admitted. It is submitted, however, that at no time has the Act been subject to challenge by the respondents with respect to the matters mentioned in section 21 (c). The Act imposes taxes in the interests of general welfare. If one who pays a processing or floor-stocks tax may challenge the Act at all, he may challenge only its tax features, and not the program by which the general welfare is to be furthered under the Act. If the strictly agricultural features of the Act or the methods pursued and the regulations adopted by the Secre-

tary of Agriculture, in connection with those features, may be challenged on the ground that they involve an illegal exercise of power, they may be challenged by those, and only those, if any there are, who can show themselves adversely affected through the application of that power to *them,* in connection with those features of the Act.

> "* * * it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern Railway v. King,* 217 U. S. 524, 534; *Engel v. O'Malley,* 219 U. S. 128, 135; *Standard Stock Food Co. v. Wright,* 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. R. v. Jackson Vinegar Co.,* 226 U. S. 217, 219; *Rosenthal v. New York,* 226 U. S. 260, 271; *Darnoll v. Indiana,* 226 U. S. 390, 398; *Plymouth Coal Co. v. Pennsylvania,* 232 U. S. 531, 544; *Missouri, Kansas & Texas Ry. v. Cado,* 233 U. S. 642, 648."
>
> *Jeffrey Mfg. Co. v. Bragg,* 235 U. S. 571, 576.

If the Agricultural Adjustment Act appropriated funds to the agricultural program without specifying the sources of the funds, and a separate act laid these excises without mention of the program, a taxpayer, coming within the scope of the latter act could not challenge the Agricultural Adjustment Act.

See *Frothingham v. Mellon,* 262 U. S. 447, 486 *et seq.*

Can it be that such taxpayer may challenge the program merely because the program is provided for and the excises are imposed in one and the same act?

The separability provisions of section 14 of the Act help conduce to a negative answer to the question.

CONCLUSION

It is submitted, in conclusion, that if the constitutionality of processing and floor-stocks excises is to be judged by the purposes and effects of the Act as a whole, these excises are valid, because the Act as a whole subserves the general welfare which the Constitution as a whole contemplates, subserves the general welfare as contemplated in the tax clause of the eighth section of the first Article of the Constitution, subserves the general welfare which it is the object of the police power of the Nation to protect.

It is submitted, further, in conclusion, that the Act does not contravene, in its tax provisions or in any of its other provisions, any limitation which the Constitution imposes upon the exercise of congressional power. The taxes under consideration are of the sort known as excises, and are uniform throughout the United States. Being genuine (not laid for the purpose of penalizing any person or persons), they trench on neither the Fifth nor the Tenth Amendment. The Act involves no undue delegation of power to the executive branch of the government. However, if the Secretary of Agriculture has exercised power not originally duly delegated to him by the Act, his exercise of such power has been duly validated by Congress. Moreover, if the purposes of the Act as a whole are embraced within considerations of general welfare, the Act accomplishes the end ("to provide for * * * the general welfare") for which the power of Congress to lay and collect taxes may be exercised, and the *method* of furthering the general welfare through the contracts and other consensual arrangements authorized by the

Act is not subject to challenge by any one whose status is simply that of a taxpayer. Respectfully submitted,

VERNON A. VROOMAN,
Counsel for the League for Economic Equality,
as Amicus Curiae.

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No. 401

Supreme Court of the United States

OCTOBER TERM 1935

UNITED STATES OF AMERICA, *Petitioner*

v.

WILLIAM M. BUTLER ET AL., RECEIVERS OF HOOSAC MILLS CORPORATION

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

BRIEF OF AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE

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Congressional Committee Reports:

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Congressional Documents:

S. Mis. Doc. 53, 49th Cong., 2nd Sess., entitled "Veto Messages of the Presidents of the United States" 78
S. Doc. 224, 67th Cong., 2nd Sess., entitled "Operation of Rates in the Emergency Tariff Act" 9
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S. Doc. 141, 70th Cong., 1st Sess., entitled "Veto Message Relating to the Agricultural Surplus Control Act" 136
S. Doc. 180, Part I, 72nd Cong., 2nd Sess., entitled "Economic Analysis of Foreign Trade of the United States" .. 9
S. Doc. 70, 73rd Cong., 1st Sess., entitled "World Trade Barriers in Relation to American Agriculture" 9
H. Doc. 195, 67th Cong., 2nd Sess. 133

Congressional Hearings:

House Committee on Agriculture:

"McNary-Haugen Bill", January 21-March 19, 1924, 68th Cong., 1st Sess. 132
"Agricultural Relief", February 2-19, 1925, 68th Cong., 2nd Sess. 133
"Agricultural Relief", January 15-April 21, 1926, 69th Cong., 1st Sess. 134
"Agricultural Relief", January 7-10, 1927, 69th Cong., 2nd Sess. 134
"Agricultural Relief", January 17-February 24, 1928, 70th Cong., 1st Sess. 135
"Agricultural Relief", March 27-April 4, 1929, 71st Cong., 1st Sess. 136
"Agricultural Adjustment Program", December 14-20, 1932, 72nd Cong., 2nd Sess. 85, 87, 104, 138
"Farm Marketing Program", February 16-18, 1932, and May 4-11 and 25, 1932, 72nd Cong., 1st Sess... 138

Senate Committee on Agriculture and Forestry:

"Stabilizing the Prices of Certain Agricultural Products", January 26-March 22, 1922, 67th Cong., 2nd Sess. 133
"Purchase and Sale of Farm Products", January 7-26, 1924, 68th Cong., 1st Sess. 132
"To Promote Cooperative Marketing", March 5-23, 1926, 69th Cong., 1st Sess. 134
"Agricultural Relief", March-April, 1926, 69th Cong., 1st Sess. 134
"Agricultural Relief", January 18-20, 1927, 69th Cong., 2nd Sess. 134
"Farm Relief Legislation", March 25-April 12, 1929, 71st Cong., 1st Sess. 136
"Farm Relief Bills, Pertaining to Agricultural Marketing, Abolishing Federal Farm Board, and Others", April 26-29, 1932, 72nd Cong., 1st Sess. 138
"Agricultural Adjustment Relief Plan", January 25-February 6, 1933, 72nd Cong., 2nd Sess. 87, 104, 138

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"Agricultural Emergency Act to Increase Farm Purchasing Power", March 17-28, 1933, 73rd Cong., 1st Sess. 105, 139

Senate Committee on Finance:

"Investigation of Economic Problems", February 13-28, 1933, 72nd Cong., 2nd Sess. 48, 87, 139

Joint Hearings of House Committee on Agriculture and Senate Committee on Agriculture and Forestry:

"The McNary-Haugen Bill", January 21, 1925, 68th Cong., 2nd Sess. 133

Subcommittee of House Committee on Appropriations in Charge of Permanent Appropriations:

"Permanent Appropriations", 73rd Cong., 2nd Sess... 31, 33

Congressional Record:

3 Annals of Congress, (Cod fishery bounties debate) pp. 362 to 401 ..... 63, 64, 65, 66
3 Annals of Congress 66 64
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65 Cong. Rec. 10341 132
67 Cong. Rec. 9863 134
67 Cong. Rec. 11872 134
68 Cong. Rec. 4099 134
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69 Cong. Rec. 10780-10785 136
71 Cong. Rec. 2661 136
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77 Cong. Rec. 1647 53
July 1, 1935 (daily ed.), Appendix, 10975, 10979-10980.. 41

Miscellaneous:

Agricultural Department Publications:

"Statement Showing Status of Cotton Program as of August 31, 1935", Agric. Adj. Adm., issued November, 1935 34
"Agricultural Adjustment", Report of Agric. Adj. Adm. for May, 1933-February, 1934 17
"Financial Statement with respect to the Cotton Program as of August 31, 1935", Agric. Adj. Adm., issued October 25, 1935 23

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"Classification of Leaf Tobacco Covering Classes, Types and Groups of Grades", Bur. of Agric. Economics, Service and Regulatory Announcement No. 118, November, 1929 17
"Agricultural Adjustment in 1934", (1935)..20, 23, 48, 70, 90
"The Agricultural Situation", Bur. Agric. Economics, Vol. 19, No. 10, October 1, 1935..... 48
"Estimated Distribution of Rental and Benefit Payments by Months (Fiscal years 1935 and 1936)", Agric. Adj. Adm., Budget Section, Finance Division, issued September 13, 1935 101
"Agricultural Adjustment Act—Constitutionality of the Agricultural Adjustment Act as amended by the Bill H. R. 8492", prepared by Solicitor, Dept. of Agric., for Committee on Forestry and Agriculture, U. S. Senate. 140
"Wheat Production Adjustment", Agric. Adj. Adm., No. 20, June 25, 1935 90
Press Releases 32-36, 268-36, and 749-36, Agric. Adj. Adm., July 6, August 16, and October 30, 1935, respectively 90

"American State Papers—Commerce and Navigation", Vol. I 60

Bureau of Census Publications:

"Cotton Production and Distribution", Bulletin 171, issued 1934 19

August report of cotton consumed, etc., preliminary report issued September 14, 1935 19

Corwin's "The Twilight of the Supreme Court"..... 41

Cooley's "Constitutional Limitations", 8th ed..... 95

Elliot's "Debates on the Federal Constitution", Vol. III.... 44

Giles' "Political Miscellanies", (1827)..... 46

Hamilton's "Report on Manufactures", 3 Annals of Congress, Appendix, pp. 971-1034 .....41, 57, 58, 59, 78

Jefferson's "Report on the Fisheries", American State Papers —Commerce and Navigation, Vol. 1 .....57, 60

"Laws Relating to Agriculture", compiled by Elmer A. Lewis, Document Room, House of Representatives (1935)..... 5

Lawson's "The General Welfare Clause"..... 41

Manual, U. S. Senate 30

Manual, House of Representatives, Rules of House..... 30

Richardson's "Messages and Papers of the Presidents"..... 79

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Story's "Commentaries on the Constitution", 5th ed., Vol. I..42, 62

Treasury Department Publications:

"Internal Revenue Collections Fiscal Year 1935", preliminary statement issued July 31, 1935..... 19
Mimeographed comparative statement of internal revenue collections for the month of July, August, and September, 1935, issued August 21, September 20, and October 18, respectively..... 19
Annual Report of the Secretary, 1932..... 57
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"Writings of James Madison, The", Hunt ed., Vol. IX..... 43

Supreme Court of the United States

OCTOBER TERM 1935

No. 401

UNITED STATES OF AMERICA, *Petitioner*

v.

WILLIAM M. BUTLER ET AL., RECEIVERS OF HOOSAC MILLS CORPORATION

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

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BRIEF OF AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed by the American Farm Bureau Federation as amicus curiae. The Federation is an organization incorporated under the laws of Illinois to promote, protect, and represent the business, economic, social, and educational interests of the farmers of the nation and to develop agriculture. There are affiliated in the Federation

approximately 36 State and 1300 county farm bureaus and the Associated Women of the American Farm Bureau Federation. The farm bureaus are organizations of farmers with membership generally on a family basis.

The interest of the Federation in the pending litigation lies in the fact that a large number of its farmer members hold contracts with the Government in connection with surplus control programs pursuant to the Agricultural Adjustment Act and, pursuant to such contracts, receive rental and benefit payments from the Government payable in large part out of appropriations measured by the proceeds of the processing taxes whose constitutionality is at issue in this litigation; that the prices received by members of the American Farm Bureau Federation for agricultural commodities produced by them are directly affected by the imposition of the processing taxes and the operations under the Agricultural Adjustment Act; and that the Federation has repeatedly endorsed the legislation and its administration and is of the opinion, as shown by its official acts and resolutions, that the legislation, including the processing tax, is essential to a sound program for the rehabilitation of agriculture in the nation. The membership of the farm bureaus has as extensive an interest in the Act, even if measured solely by pecuniary standards, as have the processors subject to the taxes. For these reasons the American Farm Bureau Federation has filed this brief as amicus curiae.

SCOPE OF BRIEF

Cotton is the only commodity involved in the Government's claims for processing taxes which the respondents prayed be disallowed. These processing taxes were imposed prior to the recent amendments to the Agricultural Adjustment Act. The Act (section 14) provides that—

> "If any provision of this title is declared unconstitutional, or the applicability thereof to any * * * cir-

> cumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other * * * circumstances, or commodities shall not be affected thereby."

It is submitted that even a decision adverse to the Government would not necessarily affect the validity of the Act as applied to commodities other than cotton. The separability clause in question is not in the form commonly found in Acts of Congress. Its very uniqueness of form (particularly its reference to "commodity") indicates that it was included after full Congressional consideration; that it is intended to produce precisely the result stated. The processing taxes on commodities other than cotton introduce in substantial degree legal considerations differing from those present in the cotton processing tax. This brief, therefore, is confined to the constitutionality of the Agricultural Adjustment Act as applied to processing taxes on cotton, imposed prior to the recent amendments to the Act.

Also, this brief relates only to processing taxes and not to floor stock taxes. The processing tax is fundamental, in the view of amicus curiae, to sound financing of surplus control programs under the Act. The floor stock tax is necessary and proper to prevent evasion of the processing tax through abnormal accumulation of stocks of processed commodities on distributors' floors prior to commencement of the processing tax and abnormal depletion of such stocks prior to termination of the tax. The floor stock tax is fair and reasonable as an effort to prevent unfair competitive situations arising among processors and distributors immediately following commencement or termination of the processing tax. Nevertheless, the floor stock tax, while important, is an incidental and not a fundamental feature of the Act. This brief by amicus curiae is, in consequence, confined to the constitutional issues affecting the processing tax.

JURISDICTION, STATEMENT OF FACTS, AND STATUTES INVOLVED

For the purposes of this brief, amicus curiae adopts the statements found in the brief for the United States with respect to the opinions below, the jurisdiction of this Court, the question presented, the statutes involved, the facts, the specification of errors to be urged, and the scope of the Agricultural Adjustment Act. The statutes involved, however, are also set forth in Appendix I, pages 118 to 131 of this brief.

SUMMARY OF LEGISLATIVE HISTORY

The Agricultural Adjustment Act in its present form is the outgrowth of practically constant investigation, deliberation, and action by Congress over more than a decade. It is believed that few measures upon the statute books today are founded upon such intensive and mature legislative consideration. The legislative history of the Agricultural Adjustment Act is pertinent to the consideration of certain of the constitutional questions at issue. The official documents comprising this legislative history, setting forth the Congressional hearings and investigations, the committee reports, the debates in either House, and the several bills in their various parliamentary stages, are documents of which this Court may take judicial notice. That history, however, is not confined to the Congressional action during the 73rd Congress. The present Act was developed as the result of affirmative legislative action involving extensive deliberations over the period of eleven years from 1924 to 1935. Not only the 73rd Congress but also the 68th, 69th, 70th, 71st, 72nd, and 74th Congresses are each partly responsible for the development of the legislation in its present form. The provisions of the present Act resulted from legislative hearings and investigations conducted during the earlier Congresses. Some of the more recent hearings were referred to in the committee reports

upon the Act. The constitutional issues involved in the present Act, such as taxation for the general welfare, will be found to have been considered in detail by committees in reports upon the legislation in its earlier forms. Often the substance, and occasionally the precise language of the present Act, as, for instance, portions of that relating to the processing taxes, will be found to have first been the subject of legislative action during an earlier Congress and to have been discussed in the committee reports at the time.

During the period from 1924 to 1933, measures involving the basic principle of the Agricultural Adjustment Act—that is, removal of the disparity between the price levels of farm and industrial products through some method of control over surplus production of farm products—were reported by the House Committee on Agriculture on eight occasions and by the Senate Committee on Agriculture and Forestry on ten; rejected by the House twice and then passed by it five times; rejected by the Senate twice and passed by it four times; passed by the Congress four times; vetoed by President Coolidge twice (First and Second McNary-Haugen bills); and approved by President Hoover once (Farm Board Act) and by President Roosevelt once (Agricultural Adjustment Act). During that period, one such measure that had been placed on the statute books (the Farm Board Act) was found inadequate and repealed.[1] During that period, a large amount of supplemental legislation in the fields of agricultural credits and mortgages, cooperative marketing, seed loans, increased agricultural tariffs, stimulation of new uses for farm products, and the like[2] was enacted as helpful in meeting the situation but never regarded as an adequate legislative solution of the more fundamental problem of the disparity between agricultural and industrial prices. From 1922 to

[1] Certain loan provisions, not here pertinent, were allowed to remain in effect.

[2] For many of these, see "Laws Relating to Agriculture", compiled by Elmer A. Lewis, Document Room, House of Representatives, 1935.

1933 there were conducted 20 major legislative hearings and investigations to the end of devising legislative remedies for such price disparity. Finally, since 1933, the original Agricultural Adjustment Act has not only been amended from time to time but at the last session of Congress it was further considered, reaffirmed as to its basic principles, and extensively amended as to its details.

To facilitate the consideration of the legislative history of the Act there is set forth in Appendix II a brief summary of the various bills which obtained favorable committee action and the various committee reports, hearings, and investigations thereon.

A review of the legislative history shows that the original surplus control proposal was introduced in Congress early in 1924. In reporting the legislation the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry made numerous, elaborate findings with reference to the depression in agriculture and its causes and consequences. (H. Rept. 631, 68th Cong., 1st Sess.; S. Rept. 410, 68th Cong., 1st Sess.) A succinct statement of similar findings is that made by the House committee at the time of reporting the National Emergency Bill (H. R. 13991, 72nd Cong., 2nd Sess.) on January 3, 1933. (H. Rept. 1816, pp. 1-2) This bill was passed by the House and reported to the Senate in the session immediately preceding the enactment of the Agricultural Adjustment Act and but a few weeks before the consideration by Congress of that Act was begun. The National Emergency Bill provided processing taxes and obviously served as a model for the Agricultural Adjustment Act, the very language being followed in some instances. The findings of the House committee at the time of its report on the National Emergency Bill were embodied in the following statement:

> "No discussion is necessary to establish the fact that there exists in this country a condition of economic maladjustment and that this condition is in sub-

stantial measure attributable to the discriminations from which agriculture has suffered for many years past. Prices for all farm products average today about half what they were before the World War. Since the pre-war period wheat has suffered a loss of approximately 65 per cent of its purchasing power, cotton 53 per cent of its purchasing power, tobacco 19 per cent of its purchasing power, and hogs 59 per cent of their purchasing power. On the other hand, taxes on agricultural lands have since the pre-war period increased approximately 150 per cent and farm indebtedness has increased approximately a like percentage. Agricultural freight rates are more than 50 per cent in excess of pre-war freight rates.

"We produce surpluses of cotton, wheat, and a number of other major farm commodities. No direct tariff can place such commodities on a basis of equality with industrial products that for many years have had the benefit of tariff protection. Agricultural tariffs have almost without exception proved ineffective. Yet tariff rates on industrial articles which the farmer buys, and the cost of such articles to him, have greatly advanced. The result has been that the producers of agricultural commodities must bear the burden of the tariff without receiving its advantages. While the average price of farm products has decreased 46 per cent since the war, the prices of industrial articles bought by the farmer has increased as much as 58 per cent during the postwar period, and even during the present year ranged from 106 to 117½ per cent of pre-war prices. Thus the farmer's dollar has less than half its pre-war value.

"Because of these various disparities, the farmer's purchasing power for clothing, lumber, hardware, machinery, and the like is less than half normal. Lack of agricultural purchasing power is responsible directly and indirectly for more than 6,000,000 of the unemployed, according to expert testimony before the committee. (See hearings, pp. 360-361.) It is not claimed that the farmer's situation is any more desperate than that of the unemployed in the city, save for the fact that discriminations against the farmer have been continuous through the past two decades while the depression as to industry and labor, in general, has pre-

> vailed for only the past three years. It is believed, however, that the elimination of the price disparity between agriculture and industry and the bringing about of a better balance in national purchasing power will greatly reduce the number of unemployed, will aid in reestablishing the purchasing power of labor and other consumers, as well as of agriculture, and will be an effective measure toward meeting the present national emergency." [Pp. 1-2]

Other findings of fact, far more extensive than those just quoted, as to the gravity of the agricultural situation and its causes, made by the agricultural committees of the two Houses, are to be found in H. Rept. 1595, 68th Cong., 2nd Sess.; H. Rept. 1003, 69th Cong., 1st Sess.; H. Rept. 1790, 69th Cong., 2nd Sess.; H. Rept. 1141, 70th Cong., 1st Sess.; S. Rept. 664, 69th Cong., 1st Sess.; and S. Rept. 1304, 69th Cong., 2nd Sess.

For this disparity between industrial and agricultural prices the remedy originally proposed by the committees (H. R. 9033 and S. 3091, 68th Cong., 1st Sess.) was control of the surplus production of farm crops over domestic needs and elimination of the effect of such surpluses upon domestic price levels. This control was to be exercised by diverting surplus agricultural products, in raw or processed form, to foreign markets at world prices. This result was to be accomplished by establishing a Government corporation to purchase certain basic agricultural commodities at their "ratio" or "parity" price (substantially equivalent to the "fair exchange value" of the present Act) and removing them from domestic markets through sales abroad in amounts sufficient to keep the domestic price level for such basic commodities at a parity with industrial prices. The desired price level was to be arrived at statistically, on the basis of price indices already maintained by the Government departments by comparing the pre-war farm price for cotton and the pre-war wholesale price for all commodities with the current

farm price for cotton and the current wholesale price for all commodities.

Tariff protection for agricultural commodities would become effective through removal of surpluses thereof from the domestic market. Increases of existing tariffs and embargoes upon agricultural imports were authorized where necessary to protect the new domestic price level.

To meet losses suffered by the corporation in purchasing an agricultural commodity at the domestic price and selling it abroad at the world price and to cover its administrative expenses, the bill required the payment by the producer of an equalization fee (the precursor of the present processing tax) to the corporation upon the first sale of the commodity. The fee was authorized to be fixed in an amount sufficient to meet such losses and expenses, thereby prorating equally among all producers of the commodity the costs of the marketing operations and services furnished, irrespective of whether the produce of the particular farmer was disposed of upon the domestic or foreign market.

This original legislative proposal embodied the basic principle now found in the Agricultural Adjustment Act, with modifications only as to detail and mechanics and method of administration. This principle is the control of surplus production of farm products to the end of establishing a parity between agricultural and industrial prices. In later forms the proposed legislation placed supervision of the surplus control program first in a Federal Farm Board and then in the Department of Agriculture, rather than in a Government corporation. Also, with the loss of our foreign markets through the world depression, foreign trade restrictions, and high domestic tariffs (see "World Trade Barriers in Relation to American Agriculture", S. Doc. 70, 73rd Cong., 1st Sess.; "Operation of Rates in the Emergency Tariff Act", S. Doc. 224, 67th Cong., 2nd Sess.; "Economic Analysis of Foreign Trade of the United States", S. Doc. 180, Part I, 72nd Cong., 2nd

Sess.), opposition expressed by the agricultural committees of the two Houses to reduction of production ceased, and emphasis was placed in these later forms of the proposed legislation upon prevention of the creation of domestic surpluses of farm products, either (1) through payments for reduction of acreage or production, or (2) by payments of benefits upon the "domestic allotment" of crops but denying such payments upon surplus production in excess of domestic needs. Diversion to foreign markets of surpluses after they had come into existence continued as a part of the program but in a less important role. In consequence, it is found that the Agricultural Adjustment Act makes available funds not only for removal of surpluses of agricultural products and expansion of markets therefor (section 12(b)) but also for payments for reduction of acreage or production (section 8(1)) and for payment of benefits upon that portion of a crop (the domestic allotment) required for domestic consumption (section 8(1)).

In addition, under the original proposal, "the commodity was to bear the cost" through the equalization fee levied upon the first sale of the commodity for processing. The Treasury was not to bear the cost. Despite demands within Congress and legislative proposals to the effect that the farm and surplus control programs should be subsidized from general funds in the Treasury (see, for example, the following bills in the 69th Congress, 2nd Session: H. R. 15963 (Crisp bill), H. R. 15655 (Aswell bill), and S. 5088 (Curtis bill)), the committees of Congress and the farm organizations held to the principle that the cost should be financed through special levies, and Congress agreed. (See H. Rept. 1790, 69th Cong., 2nd Sess., pp. 2-4; S. Rept. 1304, 69th Cong., 2nd Sess., pp. 30-32) This principle as to financing remained a part of the surplus control legislation efforts until the Farm Board Act of the 71st Congress, when it was abandoned at the insistence of those who advocated direct appropriations from time to time

from the Treasury as preferable to the more permanent equalization fee. Under the Farm Board Act, a half-billion dollar appropriation was made from the Treasury without provision for additional taxes to reimburse the Treasury. However, in the Agricultural Adjustment Act, in order to provide a balanced budget so far as the agricultural program was concerned, the earlier plan was again resorted to and a tax upon the processing of agricultural commodities was enacted to raise the necessary revenue for the Treasury. This processing tax still involves the original principle that the commodities shall pay the cost by reimbursing the general funds of the Treasury and that the surplus control programs shall not be the cause of an unbalanced budget.

SUMMARY OF ARGUMENT

The processing tax under the Agricultural Adjustment Act is a uniform excise tax. Considering the tax apart from the expenditures under the Act (the amount of which is in general measured by the amount of the proceeds of the processing tax), the tax does not violate the due process clause of the Fifth Amendment or infringe upon powers reserved to the States by the Tenth Amendment. The tax is a revenue measure. Its rate, method of computation, and method of collection are reasonable and there is a reasonable classification of the subject matters taxed. The tax is not for a private purpose for, as subsequently argued, it is a tax to provide for the general welfare. The tax itself has no substantial effect upon production. The substantial effect of the Act upon production is achieved through the expenditure of the appropriations under the Act.

The processing tax is not invalid by reason of the appropriation or expenditure provisions of the Act. The expenditures have in fact been made from general funds in the Treasury. Respondents have no greater interest in the expenditures under the Act than have other taxpayers, and

that interest is insufficient to permit respondents to litigate the validity of the appropriation and expenditure provisions or the validity of the tax as affected by those provisions.

The expenditures are made "in consequence of appropriations made by law", and the appropriation provisions do not constitute a violation of Article I, Section 9, Clause 7, of the Constitution. Permanent indefinite appropriations are valid under that clause, and numerous legislative precedents since the early Congresses are in accord with this view.

The processing tax is a tax to provide for the general welfare of the United States. The general welfare clause is a limitation upon the taxing power and the question of whether a tax is for the general welfare is to be tested by the use made of the proceeds of the tax. A tax that provides for the general welfare is also one that provides for a public purpose. In order for a tax to be one for the general welfare its proceeds need not be expended only for carrying out the purpose of one of the enumerated powers of Congress other than the taxing power. The question of what is general welfare is one for Congress primarily to determine. The courts will not substitute their judgment for that of Congress if Congress might reasonably have concluded from the legislative record before it that the expenditures would promote the general welfare.

Protective tariff duties are excise taxes having the same objectives as the processing tax. Each promotes the general welfare in the same respects. Each produces revenue (more in the case of the processing tax) and, in addition, each is intended to aid in establishing higher price levels for domestic products. The protective tariff duties accomplish this through imposition or, more often, threat of imposition of the tax; the processing tax through expenditure of an amount measured by the proceeds thereof. The mechanism of the protective tariff tax is effective for domestic products of which no surplus is produced; but must

be supplemented by the processing tax in case of domestic products of which a surplus is produced.

The cod fishery bounties enacted by the 1st Congress as a part of the first protective tariff Act are a contemporaneous legislative exposition of the Constitution to the effect that bounties are an appropriate means of providing for the general welfare, particularly with respect to those industries suffering from the disadvantages of the protective tariff system.

Congress, after exhaustive hearings and investigations from 1922 to 1933, found that measures to control surplus production of agricultural commodities were for the general welfare inasmuch as they would benefit not only agriculture but also business, labor, and the consumer. Congress also found that, in order to avoid an unbalanced budget, it was for the general welfare that the costs of carrying out such measures should be financed through special levies. These findings of Congress are not arbitrary.

The expenditure provisions do not violate the Tenth Amendment. The expenditure provisions involve no "regulation" of production. The Act is purely voluntary, and the individual farmer is free to accept or reject its benefits. This has proved true in practice. The right of the States to control local affairs is not infringed. The fact that Congress does not have general regulatory control over production does not make unconstitutional a law otherwise valid which attempts, through voluntary means only, to attain, in the interest of the general welfare, restricted crop production.

The processing tax provisions do not involve an unconstitutional delegation of legislative power. Even assuming *arguendo* such an improper delegation, the contention of improper delegation of legislative power becomes immaterial by reason of the legalization and ratification provisions recently enacted by Congress. These provisions do not attempt to ratify an unconstitutional delegation of legislative power nor any other act which Congress could

not have authorized. Congress ratified only the acts of executive officers in determining a rate of tax and assessing and collecting the amount thereof under color of law.

However, irrespective of the legalization and ratification provisions, there is no unlawful delegation of legislative power. The rate of tax is fixed by a simple mathematical formula based upon accurate statistical data collected independently of the Agricultural Adjustment Act. The factors governing the rate of tax are capable of more precise ascertainment than cost of production or similar factors involved in our tariff and internal revenue laws. The provisions authorizing adjustments in the processing tax rates as fixed by the formula involve no improper delegation of legislative authority. In addition, they have never come into operation, are separable, and are not essential to the administration of the Act.

The time at which the tax takes effect is automatic. It depends upon the existence of a proclamation of the Secretary of Agriculture to the effect that expenditures for rental or benefit payments will be made with respect to a commodity. The power of expenditure is an inherent executive power subject only to such restrictions as are imposed by the appropriation. Exercise of the executive power of expenditure involves no delegation of any kind of power, nor does the making of the effective date of the tax automatically contingent upon an exercise of the executive power of expenditure involve delegation of power.

The fact that the time the tax takes effect is also conditioned upon the ascertainment by the Secretary of Agriculture of the marketing year for a commodity involves no improper delegation of legislative power. It is merely the ascertainment of a well-known trade fact.

ARGUMENT

I

The Tax Upon Processing of Cotton is a Valid Excise Tax

The Act provides (section 9(a)) that "The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor". In the case of cotton, processing is defined (section 9(d)(2)) as the "spinning, manufacturing, or other processing (except ginning) of cotton".

1. The tax is an excise tax.

The processing tax is a tax on the exercise of a particular right to property, the right to manufacture. It is not a tax on the cotton. The tax is, in terms, upon manufacturing and, in addition, upon spinning and processing, which are but special forms of manufacturing. Such a tax is an excise and need not be apportioned.[3] (*Ex parte Kollock,* (1897) 165 U. S. 526; *Patton* v. *Brady,* (1902) 184 U. S. 608; *McCray* v. *United States,* (1904) 195 U. S. 27; *Bromley* v. *McCaughn,* (1929) 280 U. S. 124)

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[3] In the Circuit Court of Appeals it was urged by counsel for the respondents in the instant case that the decision in *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* (1921) 255 U. S. 288, controls. There an "annual license tax" of 50 cents a gallon imposed by the State of Kentucky upon all whiskey, either withdrawn from bond or transferred in bond from Kentucky to a point outside the State, was held invalid by this Court under the State constitution. Possession of the whiskey for any purpose could not be obtained, nor any possessory right therein exercised, unless the tax had been paid. This Court found the tax to be not a license or occupation tax but a tax by reason of ownership of the whiskey, a tax on property. It is argued, therefore, that the processing tax is a tax on property and a direct tax required to be apportioned. In view of the decisions above cited holding a tax on the right to manufacture to be an excise tax, and in view of the fact that the nature of the tax in *Dawson* v. *Kentucky Distilleries & Warehouse Company* is so clearly distinguishable, that case does not merit further discussion here.

In *Knowlton* v. *Moore,* (1900) 178 U. S. 41, this Court said—

> "Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. * * *" [P. 88]

Congress itself regards the tax as an excise. In the report of the House Committee on Agriculture the Committee said—

> "The bill, however, makes provision for raising additional revenues for the Treasury that it is believed will more than equal any expenditures resulting from operation of the act. Such revenues will be obtained, in the main, from manufacturers' excise or processing taxes subsequently discussed." [H. Rept. 6, 73rd Cong., 1st Sess., p. 3]

2. The tax is uniform.

The processing tax is levied upon all spinning, manufacturing, or other processing wherever it occurs throughout the United States, irrespective of geographical considerations. The requirement of uniformity for excise taxes is no more than a requirement that the tax "operate generally throughout the United States", wherever the subject matter is found. Intrinsic uniformity is not required. (*Knowlton* v. *Moore,* (1900) 178 U. S. 41; *Patton* v. *Brady,* (1902) 184 U. S. 608; *Billings* v. *United States,* (1914) 232 U. S. 261; *La Belle Iron Works* v. *United States,* (1921) 256 U. S. 377; *Bromley* v. *McCaughn,* (1929) 280 U. S. 124)[4]

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[4] "*Regional Classifications*"—In the Circuit Court of Appeals it was urged by counsel for respondents in the instant case that the tax is lacking in uniformity by reason of the provisions of section 11 of the Act, which define "basic agricultural commodity" as meaning a prescribed list of commodities "and any regional or market classification, type, or grade" of any basic agricultural commodity. This reference in the statute to regional classifications of commodities in no wise relates to the general operation of the processing tax throughout the United States once it is imposed. The cotton processing

3. The tax does not violate the due process clause of the Fifth Amendment.

For the purposes of the discussion under this heading, the question of the validity of the processing tax is to be sharply distinguished from the question of the validity of the use of the tax proceeds or the effect of the use of such proceeds on the validity of the tax itself. The question of

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tax operates upon all cotton processed throughout the United States. There are no regional classifications, types, or grades for cotton nor has the Secretary recognized any such classification, type, or grade for cotton. It is time enough to raise this question when a regional processing tax is levied under color of the Act. (See *Hicklin* v. *Coney*, (1933) 290 U. S. 169)

However, the words "regional classification" are not an attempt to provide for a non-uniform tax but are a recognition of well-understood trade facts with regard to the production and distribution of tobacco. (See, for example, statement of House Committee on Agriculture in H. Rept. 1273, 70th Cong., 1st Sess., p. 34) There are seven regional or market classifications and 26 regional or market types of tobacco. (Classification of Leaf Tobacco Covering Classes, Types, and Groups of Grades, Service and Regulatory Announcement, Bureau of Agricultural Economics, U. S. Dept. of Agriculture, No. 118, issued November 1929, pursuant to the Tobacco Stocks and Standards Act, 45 Stat. 1079, amended 47 Stat. 669)

Agricultural experience has shown that each type is usually capable of successful production only in a particular region. Such a well-known type, for instance, as Burley tobacco can be successfully grown only in central and northeastern Kentucky, southern Ohio, southern Indiana, western West Virginia, central and eastern Tennessee, and sections of Virginia, North Carolina, Missouri, and Arkansas. Such a type has therefore come to have a regional significance and to be known as a "regional type". Further, some classes and types are used for cigarettes, some for cigar fillers, some for cigar wrappers, some for export, and some for other uses. More especially surplus production may exist as to one type and not as to another, and surpluses in one class or type will not substantially affect marketing conditions as to another type. From the standpoint of methods of production, price, uses, and characteristics, and for the purposes of the Act, the various classes and types of tobacco constitute separate commodities and require individual surplus control programs. (Report of the Agricultural Adjustment Administration for May, 1933-February, 1934, entitled "Agricultural Adjustment", p. 70)

It is therefore wholly reasonable for Congress to recognize in the Act regional or market classifications and types of commodities. That recognition in no wise affects the uniformity of an excise tax once it is levied upon any particular class or type. The processing tax on Burley tobacco, for instance, is levied on that tobacco wherever processed throughout the United States. Congress is not required to select subjects for taxation that exist uniformly in the several States.

the validity of the statutory provisions providing for expenditures under the Act and the effect of such expenditure provisions upon the validity of the tax itself are discussed later in this brief. (See pages 28 to 92)

(a) THE TAX IS A REVENUE MEASURE.

Considering the tax separately from the expenditures, there can be no reasonable doubt that the object sought to be attained by the taxing provisions of the Act is revenue. Congress, in the Act itself, states that the processing tax is levied "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency" (section 9(a)) and makes substantially the same statement in the title of the Act. The House committee, in its report, stated that the processing taxes are levied "In order to provide additional revenues for the Government". (H. Rept. 6, 73rd Cong., 1st Sess., p. 5) There is no suggestion in the legislative history of the Act that the processing tax itself, as distinguished from the expenditure of its proceeds, has any purpose other than a revenue purpose or that the processing tax provisions were enacted as a guise for reaching objectives other than the production of revenue.

Further, the processing tax provisions and the operation of the tax itself have all the indicia of genuine tax provisions. These provisions originated in the House in accordance with the constitutional requirement. The tax is collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and paid into the Treasury. (Sec. 19(a)) The tax is collected subject to the same administrative and judicial procedure and remedies as other like internal revenue taxes. All provisions of law applicable to the sales taxes imposed by section 600 of the Revenue Act of 1926 apply to the processing tax, including the provisions of section 626 of the Revenue Act of 1932, relating to returns, due date, and interest on de-

linquencies. (Sec. 19(b)) Provision is made for refunds. (Sec. 12) Exports are exempt. (Sec. 17(a)) Finally, the tax is productive of substantial revenues. Thus, up to September 30, 1935, the total tax collections pursuant to the provisions of the Agricultural Adjustment Act amounted to $933,825,150.03,[5] of which amount the processing taxes accounted for over 87 per cent, a percentage which will increase by reason of the non-recurrence of the floor stock taxes. The y sources of tax revenue producing greater returns are ome taxes.

The proce sing tax provisions having a legitimate object—namely, that of revenue—the further question arises whether the provisions are "unreasonable, arbitrary or capricious" and therefore lacking in due process.

(b) THE TAX IS REASONABLE.

(1) The tax rate is not confiscatory.—The amount of consumption of all kinds of cotton in the United States for each marketing year (i. e., August 1 to July 31) from 1929 to 1935 shows that the rate of consumption during the two years in which the processing tax has been in effect compares favorably with that for the years when the processing tax was not in effect. Thus, in the marketing years 1933-1934 and 1934-1935 there were consumed approximately 5,700,000 and 5,360,000 running bales, respectively. Equivalent figures for the marketing years 1929-1930, 1930-1931, 1931-1932, and 1932-1933 show consumption of approximately 6,106,000, 5,263,000, 4,866,000, and 6,137,000 running bales, respectively.[6]

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[5] See "Internal Revenue Collections Fiscal Year 1935", preliminary statement issued July 31, 1935, p. 6; Mimeographed comparative statement of internal revenue collections for the months of July, August, and September, 1935, issued August 21, September 20, and October 18, respectively.

[6] See the following publications of the Bureau of Census, Department of Commerce: "Cotton Production and Distribution", Bulletin 171, issued 1934; August report of cotton consumed, etc., preliminary report issued September 14, 1935.

Further, the amount of processing tax paid with respect to the cotton contained in representative retail cotton articles is far below any point where this Court could say that the business of the cotton processor was being confiscated through inability to market his products by reason of the increased cost attributable to the tax. For instance, the processing of a bleached 81x99 inches sheet results in a processing tax of 7.7 cents; a yard of bleached muslin, 1.4 cents; a 54x60 inches table cloth, 5.3 cents; a dozen napkins, 3.8 cents; overalls, 8.3 cents; a chambray shirt, 0.3 cents; carded yarn men's socks, 0.4 cents; woman's house dress, 3.4 cents; and combed yarn women's hose, 0.6 cents.[7] The Agricultural Adjustment Administration estimates that the net increase in consumers' total retail expenditures attributable to processing tax collections for 1934 probably amounts to less than 1 per cent.[8]

(2) *Method of collection of the tax is reasonable.*— The method of collection of the tax is the same as that for many other internal revenue taxes. In addition, however, recognizing that the processor usually obtains funds for the payment of the processing tax from the sales of the processed articles, Congress made adequate provision to avoid harsh results in connection with the collection of the tax. The statement of the House Committee on Agriculture commenting upon section 19(b) and (c) of the Act is an accurate analysis of the pertinent statutory provisions. Not only does the processor have from one to two months before the return is required to be filed and the tax paid[9] but, as the House committee stated in its report—

> "In order to prevent undue hardship upon processors, the Secretary of the Treasury is authorized to permit

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[7] "Agricultural Adjustment in 1934", Govt. Printing Office (1935), p. 69. See also statement of House Committee on Agriculture, H. Rept. 6, 73rd Cong., 1st Sess., p. 7.

[8] "Agricultural Adjustment in 1934", Govt. Printing Office (1935), p. 239.

[9] Regulations 81 Relating to Processing Tax and Compensating Tax, Bureau of Internal Revenue, Treasury Department, Arts. 11 and 12.

> postponement for a period not exceeding 60 days of the payment of taxes. Further, the processor, in those exceptional cases where a longer period is required before his products are sold and paid for following processing, is made eligible for loans from the Reconstruction Finance Corporation in order to finance the payment of the taxes pending receipts from his sales. These provisions will tend to enable processors to build up stocks and to make more liquid the flow of commodities in the usual marketing channels." [H. Rept. 6, 73rd Cong., 1st Sess., p. 6]

Furthermore, in the case of cotton, the Act, as amended May 17, 1935, provides that the processing tax shall be payable not upon the filing of the return, but 90 days thereafter, and that the Secretary of the Treasury may extend the time for such payment up to six months from the date of the return. (Public No. 62, 74th Cong., 1st Sess., Sec. 2)

(3) *Method of computing the rate of tax is reasonable.*— The amount of the processing tax with respect to cotton equals the difference between the fair exchange value of cotton and the current average farm price for cotton at the time the particular rate of tax is imposed. (Sec. 9(b)) It is expressed in terms of cents per pound of cotton processed. Not only is this method of measurement not lacking in due process as being unreasonable, arbitrary, or capricious but, on the contrary, it is further evidence of the revenue character of the tax provisions and of their reasonableness. As set forth above in this brief (pages 10 to 11), it was the purpose of the Congress that the surplus control program should be self-sustaining, that the legislation should provide, roughly, enough revenue to carry out the programs, and that the programs should not be carried out with funds from then existing sources of revenue and thereby become the cause of an unbalanced budget. As stated by the House Committee on Agriculture in its report, "The bill, however, makes provision for raising additional

revenue for the Treasury that it is believed will more than equal any expenditures resulting from operation of the act".[10] The same committee, in its report upon the bill during the preceding session of Congress, stated—

> "An important feature of the measure is that it is self-supporting. Amounts sufficient to pay the benefits to producers provided for in the bill are to be realized from the adjustment charges to be paid on the processing of the commodities covered, * * *
>
> "The adjustment charge to be collected on processing is to be in an amount equal to the difference between the price paid producers at local markets and the pre-war or fair exchange value of the commodity; * * *"[11]

Any attempt by Congress to assure itself of sufficient revenue before authorizing a new type of expenditure—i. e., to produce a balanced budget—has usually been regarded as at least a reasonable aim. This Court itself has said "Taxation may run *pari passu* with expenditure". (*Patton* v. *Brady*, (1902) 184 U. S. 608, 620) The provisions of the Agricultural Adjustment Act are one instance of the substantial achievement of such an aim.

The Act is intended to establish an equality of industrial and agricultural prices or, in the words of the Act, to give the farmer "a fair exchange value" for his products. The expenditures under the Act of processing tax proceeds or an equivalent amount is intended to result in such increase in the price being received by the farmer for his cotton at the time the cotton program is commenced that such original farm price, plus the increase therein and the rental or benefit payments made to the farmer, will approximate a fair exchange value for his cotton. Similarly, the amount of the tax is fixed at this difference between the

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[10] H. Rept. 6, 73rd Cong., 1st Sess., p. 3.

[11] H. Rept. 1816, 72nd Cong., 2nd Sess., pp. 5-6. For similar statement by the Senate Committee on Agriculture and Forestry, see S. Rept. 1251, 72nd Cong., 2nd Sess., p. 3.

original farm price and the fair exchange value. Thus, the amount of the cotton processing tax is measured by the same difference in cotton price levels as the expenditures measured by its proceeds are intended to eliminate. If the Act is successful in operation, the Congressional objective is accomplished by expenditures limited to an amount measured by the processing tax proceeds and a balanced budget results so far as the operations under the Act are concerned. Expenditures have in fact to date approximated the processing tax receipts.[12]

Usually, the particular tax receipts which pay immediately or eventually for a new subject of Congressional expenditure are necessarily concealed among the many sources of Treasury income from taxes, bond issues, and other sources. In the Agricultural Adjustment Act the source of the receipts to meet the expenditure is disclosed. The necessary revenue is provided in the same Act which authorizes the expenditures. Were such a result compulsory under the Constitution in all instances, unnecessary expenditures would tend to be discouraged and taxpayers benefited. Certainly, the due process clause does not prohibit a rate of tax measured approximately by the expenditures to be made nor does it prohibit the disclosure of this fact on the face of the statute and compel the incurring of Treasury deficits or the enacting in separate legislation of revenue provisions adequate to meet the expenditures.

(c) THERE IS A REASONABLE CLASSIFICATION OF SUBJECT MATTERS TAXED.

Congress may make any reasonable classification of subject matters to be taxed. It has wide discretion in this matter so long as the classification is not purely arbitrary. It

[12] "Agricultural Adjustment in 1934", Govt. Printing Office (1935), p. 304; "Financial Statement with respect to the Cotton Program as of August 31, 1935", publication of Department of Agriculture, Agricultural Adjustment Administration, issued October 25, 1935.

is not restrained as to a particular group of commodities or of persons to be affected by a tax or the particular activities or property uses to be taxed, so long as its action is not capricious and the tax is not an unapportioned direct tax. A tax levied upon processing, which is one use of a commodity, i. e., its conversion from one form to another through a manufacturing process, is not an arbitrary selection of the point of imposition for an excise tax.

The selection of basic commodities such as wheat, cotton, field corn, hogs, rice, tobacco, and milk (section 11) is obviously a selection of those commodities as to which the quantity of the commodity and the amount thereof processed is so large that substantial revenues are likely to be produced. Particularly does the selection become appropriate when it is of the same commodities with respect to which Congress provides for surplus control programs under the Act. The principle that "the commodity shall pay the cost", referred to earlier in this brief (pages 10-11), is a reasonable basis for selection of the objects with respect to which the tax is to be imposed. It is the principle that the consumer of a product is not entitled to low prices, or the distributor thereof to increased profits, at the expense of a fair price to the farmer. The consumer should pay for the commodity a price sufficient to enable the farmer to obtain a fair price. As stated by the House Committee on Agriculture in its report—

> "In the long run, consumers can not expect to buy any product at a price which represents less than a fair return to the labor and capital involved in producing the commodity. The ultimate danger to the consumer in the present extremely low prices for agricultural products is that, if continued, they will shortly result in the ruin of our agriculture and it will eventually be necessary to pay unduly higher prices before it can be restored. The consumer as well as the farmer and the business man has everything to gain from a fair and balanced relationship between production and consumption that will restore to agricultural

commodities their pre-war purchasing power. The present economic emergency is in large part the result of the impoverished condition of agriculture and the lack of ability of farmers to purchase industrial commodities. * * *" [H. Rept. 6, 73rd Cong., 1st Sess., p. 7]

(d) THE TAX DOES NOT CONSTITUTE A TAKING OF PROPERTY FOR A PRIVATE PURPOSE.

Respondents urge that the tax is a taking of private property for an ostensible public purpose without just compensation and in fact is a taking for a private and not a public purpose, in violation of the Fifth Amendment. (R. 7, Par. 10 and R. 6, Par. 4)

As to this contention, it suffices to say that no excise tax constitutes a taking of property within the meaning of that clause of the Fifth Amendment which provides "nor shall private property be taken for public use, without just compensation". To hold otherwise would nullify the Federal power of taxation.

Further, the contention does not present a question with reference to the tax as such, considered apart from the expenditure of the tax proceeds. It presents a question to be tested by the purpose of the expenditures. Thus, in *Magnano Co.* v. *Hamilton,* (1934) 292 U. S. 40, this Court had before it an excise tax of 15 cents per pound levied by the State of Washington on all butter substitutes sold within the State. Mr. Justice Sutherland in delivering the opinion of the Court said—

"That the tax is for a public purpose is equally clear, since that requirement has regard to the use which is to be made of the revenue derived from the tax, and not to any ulterior motive or purpose which may have influenced the legislature in passing the act. And a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class. * * *" [P. 43]

Therefore, the question whether the tax is for a public purpose is argued later in this brief (pages 36-40) in connection with the discussion of the effect of the expenditure provisions upon the validity of the tax.

4. The tax does not violate the Tenth Amendment.

In the opinion of the Circuit Court of Appeals it is stated that the processing tax constitutes a regulation of production and is therefore a violation of the Tenth Amendment. (R. 33-49) It is submitted that such conclusion again involves confusion of the question of the validity of the tax with the validity of the expenditure of the proceeds of the tax and the effect of such expenditures upon the validity of the tax. The processing tax itself does not regulate production of cotton any more than the manufacturers' excise tax on automobile tires regulates the production of the cotton that goes into the tires. The effect of the tax itself upon production is purely incidental. The substantial effect of the Act upon production is achieved through the expenditure of an amount measured by the proceeds of the tax. The validity of such expenditures and of the tax in the light of such expenditures is discussed later in this brief (pages 33-92).

It is true that the point of imposition of the tax, i. e., processing or manufacturing, is a subject matter generally within the regulatory authority of the States and not of the Congress. But Congress in selecting the point of imposition of a tax is not limited by the Tenth Amendment or other constitutional restrictions upon its regulatory powers. A tax may fall upon matters which are beyond the power of Congress to regulate under the commerce clause or under its other enumerated powers.

The processing tax is not invalid in that its imposition or threat of imposition amounts to a regulation of manufacture. While the tax is imposed on processing or manufacturing, the imposition or threat of imposition of the tax,

as distinguished from the expenditure of its proceeds, has no effect not usual in the case of excise taxes. In fact, the effects of the processing tax are not as burdensome as those of many excise taxes heretofore held valid by this Court. The processing tax does not have the prohibitory effect of the tax on oleomargarine sustained in *McCray* v. *United States,* (1904) 195 U. S. 27, nor the regulatory consequences of the tax with respect to narcotics sustained in *United States* v. *Doremus,* (1919) 249 U. S. 86, and *Alston* v. *United States,* (1927) 274 U. S. 289. The processing tax does not vary with variations of the laws of the several States as did the tax sustained in *Knowlton* v. *Moore,* (1900) 178 U. S. 41. The processing tax is not necessarily absorbed by the processor but may be passed on to the consumer or back to the producer, which is more than was claimed by the payors of the tax on sales of commodities upon exchanges sustained in *Nicol* v. *Ames,* (1899) 173 U. S. 509. In so far as the processing tax is passed on to the consumer, it does not differ in effect from the tariff duties sustained as an exercise of the taxing power of Congress in *J. W. Hampton, Jr. & Co.* v. *United States,* (1928) 276 U. S. 394. A collateral intent, even if present, would not invalidate the tax. (*Magnano Co.* v. *Hamilton,* (1934) 292 U. S. 40, and cases there cited)

This case is unlike the *Child Labor Tax Case,* (1922) 259 U. S. 20, and *Hill* v. *Wallace,* (1922) 259 U. S. 44. The incidental effects of the processing tax flow solely from its imposition upon processing and involve no regulation of production. The effect upon production follows from expenditures measured by the proceeds of the tax and not from the tax as such. The purpose of the tax is not to regulate. It has not the quality of a penalty for violation of a prescribed course of conduct. Scienter is not an element of the tax. The imposition of the tax or the threat of its imposition results in no action of a regulatory character. Its purpose is revenue, and any other effect it has is only that usual and normal to a moderate excise tax

imposed upon manufacturing. As to the statutes involved in the *Child Labor Tax Case* and *Hill* v. *Wallace* the purpose of Congress would have been most effectively accomplished if the taxes imposed had produced no revenue. That is not true of the processing taxes. With them, the more the revenue the better the Congressional purpose is effectuated.

II

The Processing Tax is Not Invalid by Reason of the Appropriation and Expenditure Provisions of the Act

1. The appropriation is a valid appropriation under Article I, Section 9, Clause 7, of the Constitution.

The Constitution provides in Article I, Section 9, Clause 7, that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law". The respondents in their first report to the District Court of the United States (R. 5, Par. 8) apparently urged that the appropriation provisions of the Agricultural Adjustment Act are invalid by reason of the constitutional provision above quoted. In addition to the appropriation of moneys in the Treasury from sources other than the processing tax, the Agricultural Adjustment Act as originally enacted provided that—

> "the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of

any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection." [Sec. 12(b)]

Under section 12(b), as amended August 24, 1935, the processing tax proceeds are not appropriated but are covered into the general funds of the Treasury, and a sum equal to the proceeds derived from the processing and other taxes under the Act is appropriated. The text of section 12(b) of the Agricultural Adjustment Act, as amended by the Act of August 24, 1935, is as follows:

"(b) In addition to the foregoing, for the purpose of effectuating the declared policy of this title, a sum equal to the proceeds derived from all taxes imposed under this title is hereby appropriated to be available to the Secretary of Agriculture for (1) the acquisition of any agricultural commodity pledged as security for any loan made by any Federal agency, which loan was conditioned upon the borrower agreeing or having agreed to cooperate with a program of production adjustment or marketing adjustment adopted under the authority of this title, and (2) the following purposes under part 2 of this title: Administrative expenses, payments authorized to be made under section 8, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection."

(a) RESPONDENTS HAVE INSUFFICIENT JUSTICIABLE INTEREST TO LITIGATE THE QUESTION.

The prayer of the respondents in this case is that certain claims of the United States for processing and floor

stock taxes be disallowed. The respondents have no direct interest in the appropriation provisions of the Act as such but only in so far as those appropriation provisions may affect the validity of the tax. Whether or not the appropriation is made in accordance with the constitutional requirement cited above can not affect the validity of the tax. The constitutional requirement is a mandate directed exclusively to officers of the Government charged with the custody and disbursement of Government moneys. (*Collins* v. *United States,* (1879) 15 C. Cls. 22) The legislation governing the duties of the Comptroller General of the United States and the rules of the respective Houses governing the functions of those several committees having jurisdiction over expenditures in the executive departments (Manual, U. S. Senate, Standing Rule XXV; Manual, House of Representatives, Rules of the House, Rule XI, Pars. 36-46) provide adequate safeguards to assure that public moneys are expended only pursuant to appropriations made by law and that those officers charged with the custody and disbursement of public moneys are faithfully observing the constitutional mandate. The respondents have no interest sufficient to require adjudication by the courts of the question whether the expenditures made by the Secretary of Agriculture under the Act are "in consequence of appropriations made by law". (*Frothingham* v. *Mellon,* (1923) 262 U. S. 447).

(b) A PERMANENT INDEFINITE APPROPRIATION IS VALID.

Moreover, the expenditures of the Secretary of Agriculture under the Act are made "in consequence of appropriations made by law". It is not denied by respondents that the expenditures of the Secretary of Agriculture are made pursuant to the statutory provision above quoted with reference to appropriations. While amicus curiae is not aware of any judicial decisions on the point, legislative practice well demonstrates that an appropriation by Act of Con-

gress in the terms set forth in section 12(b) of the Act is an appropriation made by law in conformity with the constitutional requirement.

An appropriation may be permanent, except for the specific constitutional limitation of two years upon funds appropriated for raising and supporting armies. (Constitution, Art. I, Sec. 8, Clause 12) The amount of an appropriation may be specific or indefinite. It may be payable from general funds of the Treasury, from a special fund composed of certain receipts specifically set aside by law and dedicated for expenditure for a specific purpose, from a trust fund, or from a contributed fund from private or non-Federal sources.[13] The appropriations made by section 12(b) of the Act are permanent, indefinite appropriations from general funds in the Treasury.

Permanent appropriations have been a common legislative practice for more than 130 years. With respect to permanent appropriations of the various types, the Subcommittee of the House Committee on Appropriations in charge of Permanent Appropriations in the 73rd Congress said—

> "However, from the modest beginning of the Act of 1798, the practice [i. e., of permanent appropriations] has grown until at the present time the Committee has uncovered 370 items of this character in our laws calling for, and permitting, without any scrutiny by this or any other Congress, the estimated expenditures of $2,304,784,450 for the fiscal year 1935, as disclosed in the budget."[14].

In the print of the hearings conducted by that subcommittee in 1934 there are listed some 27 pages of various types of permanent appropriations.[15] Certainly such a practice, which has continued throughout our constitutional

[13] See analysis made by Subcommittee of the House Committee on Appropriations in Charge of Permanent Appropriations in hearings before the subcommittee, 73rd Cong., 2nd Sess., entitled "Permanent Appropriations".

[14] Id., p. 1.

[15] Id., pp. 962-989.

history, can not be said at this late date to be in violation of a constitutional requirement which imposes no limitation upon the form in which appropriations may be made. While the subcommittee complained of the "usurpation", through permanent appropriations made by prior Congresses, of the right of later Congresses to exercise control over current appropriations as well as to follow up their judicious expenditure, the subcommittee admitted that permanent appropriations were in "technical" compliance with the constitutional provision.[16]

Whatever may be the propriety of the subcommittee's position as a matter of legislative policy, such permanent appropriations, whether specific or indefinite and whether from general, special, or other funds, are not in violation of the constitutional requirement. Such appropriations have no binding effect upon subsequent Congresses and do not constitute an usurpation.[17] Each Congress is free to

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[16] Id., p. 1.

[17] The statement of the Senate Committee on Appropriations is more accurate (S. Rept. 1195, 73rd Cong., 2nd Sess.):

> "The present method of handling these permanent annual appropriations is only through their submission in the annual Budget. This does not result in any material degree of publicity or careful scrutiny." [P. 2]

In the 52nd Congress the House Committee on Appropriations made the following statement with respect to the extent and effects of the practice:

> "It will be observed that the tendency to increase the number of permanent appropriations is of decided growth in comparatively recent times. It serves executive convenience to escape the task of annual discussions to procure estimates, and it lessens public scrutiny to afford this relief. Stability for certain payments is sought by this means; but it takes from the country and from Congress the habit of voluntarily providing yearly for those obligations which most strongly appeal to the debt-paying sentiment. In the great increase of public business Congress seems to vibrate between a disposition to retain full scrutiny of the public business and a desire to escape some of the annual labor involved." [H. Rept. 2610, 52nd Cong., 2nd Sess., p. 2]

This committee of the 52nd Congress made an extensive investigation of permanent indefinite appropriations and finally reported legislation repealing some but retaining others of such appropriations.

exercise such supervision and control over them as it sees fit. In fact, the subcommittee in question ultimately exercised such supervision and control by reporting the Permanent Appropriation Repeal Act, 1934, which repealed many, but not all, of such appropriations. (48 Stat. 1224) Obviously, the subcommittee did not find itself bound by Acts of prior Congresses. The appropriation for the Agricultural Adjustment Administration here in question was one of those brought specifically to the attention of the subcommittee but not repealed by Congress in that legislation.[18]

2. The tax is a tax to provide for the general welfare of the United States.

(a) RESPONDENTS HAVE INSUFFICIENT JUSTICIABLE INTEREST TO LITIGATE THE QUESTION.

Respondents have no justiciable interest sufficient to require the courts to adjudicate the constitutional validity of the appropriation and expenditure provisions of the Act. Respondents are burdened by the tax, not the expenditure of the proceeds of the tax, and then only if they absorb the

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[18] When the item of processing taxes under the Agricultural Adjustment Act was reached during the discussion at the hearings, the chairman of the subcommittee made the following statement:

> "Item no. 116 on our agenda deals with the processing tax under the Agricultural Adjustment Administration Act. The Budget for 1935 carries an estimate of $831,022,428. This legislation is not permanent in its nature, and the subcommittee in charge of appropriations for the Department of Agriculture has given an extensive hearing on this item for the fiscal year 1935. We will not enter into any discussion of this item in our hearings." [Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, in Charge of Permanent Appropriations, entitled "Permanent Appropriations", 73rd Cong., 2nd Sess., p. 88]

In stating that the legislation was not permanent, the chairman of the subcommittee had reference to the provisions of section 13 of the Agricultural Adjustment Act, which give to the Act a temporary character. The appropriation, however, is a permanent appropriation, not renewed annually, and endures without further action by Congress so long as the Act remains in effect.

tax and do not pass it on. Nor is the extent of the respondents' interest altered because under the original Act the processing tax proceeds were segregated in a special fund in the Treasury and appropriated for the purposes enumerated in section 12(b) of the Act. Even under the original Act, any moneys in the Treasury, irrespective of their source, were made available for such purposes pursuant to joint estimates of the Secretary of Agriculture and the Secretary of the Treasury. (Sec. 12(b)) Not only the corporation for which the respondents are receivers but other processors and all taxpayers are similarly situated as to the extent of their interest in expenditures for surplus control programs. Under the amended Act (section 12(b)) the appropriation is made exclusively from general funds in the Treasury.

Usually, expenditures during any marketing year for a particular surplus control program occur earlier than the payment into the Treasury of the larger part of the receipts from the processing tax for that marketing year. To meet this situation, Congress provided, even in the case of the original Act, for an appropriation from the general funds of the Treasury to be expended by the Secretary of Agriculture pursuant to the joint estimate. The Treasury general funds are then reimbursed for these advances as the payments of the processing taxes later flow in.

According to the latest figures available, figures as of August 31, 1935, actually all the receipts of the processing taxes upon cotton, in the amount of $242,270,781.78, have been used to reimburse the Treasury for advances from the general funds of the Treasury made for rental and benefit payments under the cotton programs and for administrative expenses and processing tax refunds.[19] Thus, the expenditures under the Act to date have, in fact, been made directly from general funds of the Treasury.

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[19] See publication of the Department of Agriculture, Agricultural Adjustment Administration, entitled "Statement Showing Status of Cotton Program as of August 31, 1935", issued November, 1935.

Further, Government expenditures must be met from moneys in the Treasury. What particular source of receipts supplies the funds for the particular expenditure is of little importance. If the Congress had directed that the proceeds of the processing taxes be used to defray the general expenses of the Government and that the proceeds from postal receipts or from repayment of Government loans be used to pay the expenses under the Agricultural Adjustment Act, the situation would differ no whit, from a Federal budgetary standpoint, and it would be clear that the respondents would have no justiciable interest in the expenditures. Is this situation altered because Congress saw fit to measure the appropriations and expenditures under the Act by the amount of proceeds from the processing taxes, thereby keeping a balanced budget so far as surplus control programs are concerned?

Finally, respondents have not as yet paid their processing taxes. Congress has already, by amendment of the Act, changed the disposition of the processing tax proceeds so that they are no longer appropriated for rental and benefit payments and other expenditures under the Act but are covered into the Treasury as part of the general funds and serve merely as a measure for appropriations made from the general funds of the Treasury. It still lies within the power of Congress, before the processing tax payments of the respondents are made, again to change the disposition to be made of the proceeds.

It is submitted that the respondents have no greater justiciable interest in the expenditures under the Act than other taxpayers and that the decision of this Court in *Frothingham v. Mellon,* (1923) 262 U. S. 447, denies to the respondents any right to have adjudicated the constitutional validity of the expenditures or the validity of the tax as affected by the validity of expenditures. In that case, Mr. Justice Sutherland said—

> "The administration of any statute likely to produce additional taxation to be imposed upon a vast

> number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. * * *" [P. 487]

For this Court to enable taxpayers to have adjudicated the validity of the processing tax as affected by the expenditures under this Act, would mean that the payors of a tax may question the validity of Government expenditures in each instance where Congress by way of limitation measures particular expenditures by particular receipts. In addition, it should be pointed out that the sum of one hundred million dollars from general funds in the Treasury not otherwise appropriated is also available for payments in connection with cotton surplus control programs. (Sec. 12(a))

However, irrespective of the contention set forth above, it is the position of amicus curiae that the taxes fall within the general welfare limitation.

(b) IN FEDERAL TAXATION PUBLIC PURPOSE IS COVERED BY THE GENERAL WELFARE LIMITATION.

It has been previously set forth in this brief (page 25) that any question of public purpose is a question not of the tax as such but of the use to be made of its proceeds. In the case of Federal taxes, however, the question of public purpose is but part of the question as to whether the tax is levied to provide for the general welfare. The Constitution does not provide that Federal taxes be levied for a public purpose. It provides that—

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *"[Art. I, Sec. 8, Clause 1]

It is recognized that this Court, having regard to the use made of the revenues, has invalidated State taxation for a private purpose without reference to a specific constitutional prohibition. (*Citizens' Savings & Loan Association, etc.* v. *Topeka,* (1875) 20 Wall. 655; *City of Parkersburg* v. *Brown,* (1883) 106 U. S. 487; *Cole* v. *City of La Grange,* (1885) 113 U. S. 1) More recently, however, this necessity for restriction of State taxation to public purposes has been rested upon the limitations of the due process clause of the Fourteenth Amendment. (*Green* v. *Frazier,* (1920) 253 U. S. 233) On the other hand, with respect to Federal taxation, this Court has made no corresponding decision under the Fifth Amendment. To the contrary, the history of the sugar bounty litigation shows that the validity or invalidity of Federal taxation, having regard to the objects of expenditure, rests upon the constitutional provision quoted above.

The sugar bounty litigation.—The Tariff Act of October 1, 1890, provided for a bounty payable to manufacturers or refiners of sugar. (26 Stat. 567) In order to be entitled to the bounty, the manufacturer or refiner of sugar had to receive from the Commissioner of Internal Revenue a license to produce sugar and give bond conditioned upon the observance of certain rules and regulations. The bounty was payable directly from the Treasury of the United States.

In the case of *Marshall Field & Co.* v. *Clark,* (1892) 143 U. S. 649, the unconstitutionality of the Tariff Act of 1890 as a whole was urged upon several grounds. One of these grounds was that the sugar bounty provisions of that Act were unconstitutional. This Court, however, declined to decide the question as to the constitutionality of those provisions because, in its opinion, the rest of the Act would be valid even if the bounty provisions were void.

The Tariff Act of August 27, 1894, repealed the sugar bounty provisions and made it unlawful to issue any license

or to pay any bounty for the production of sugar under those provisions. (28 Stat. 509)

In the case of *United States ex rel the Miles Planting and Manufacturing Co.* v. *Carlisle,* 5 Apps. D. C. 138, decided January 8, 1895, there was presented an appeal from a judgment of the Supreme Court of the District of Columbia dismissing a petition for writ of mandamus to compel the Secretary of the Treasury and the Commissioner of Internal Revenue to issue to the relator a license for the manufacture of sugar and to certify the amount earned by him under the sugar bounty provisions. The Court of Appeals of the District of Columbia first held that the sugar bounty provisions had been repealed by the Tariff Act of 1894 and that no rights had been reserved to the relator by the repealing Act. The court discussed by way of dictum the constitutionality of the sugar bounty provisions and declared them to be unconstitutional. A majority of the three judges held that the bounty provisions necessarily involved the power of taxation for the reason that the bounty was paid out of revenue raised by general taxation, that taxes for a sugar bounty were for a private and not a public purpose, and that the levying of taxes for a private purpose was beyond the power of Congress. The chief justice concurred in the decision of the court but declared that the discussion of the constitutional question was unnecessary for the purposes of the case.

The Sundry Civil Expenses Appropriation Act for 1896, approved March 2, 1895, made appropriations sufficient (1) to pay the unsatisfied bounty claims of manufacturers and refiners of sugar produced by them previous to the repeal of the sugar bounty provisions, and (2) to pay the claims of manufacturers and refiners who had produced sugar during the fiscal year 1896 but subsequent to the repeal of the sugar bounty provisions and who had in due time made application for a license to produce or would

have been entitled to the license had the sugar bounty provisions not been repealed.[20] (28 Stat. 910, 933)

A few months later there arose in the Federal Circuit Court for the Eastern District of Louisiana two cases, *United States* v. *Realty Company* and *United States* v. *Gay*. These cases involved claims against the United States for the payment of moneys appropriated for sugar bounty claims under the Sundry Civil Expenses Appropriation Act. The circuit court rendered judgment in favor of the plaintiffs. The cases were taken by writ of error to this Court. This Court affirmed the judgments of the circuit court. ((1896) 163 U. S. 427) It was held unnecessary in the proceeding before this Court to decide whether or not the bounty provisions of the Tariff Act of 1890 were constitutional, but this Court did decide that it was entirely within the constitutional power of Congress to make the appropriations for the relief of sugar manufacturers and refiners as provided in the Sundry Civil Expenses Appro-

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[20] In *In re Sugar Bounty*, 2 Comp. Treas. Dec. 98, decided September 4, 1895, there was presented for consideration the certificate of the Auditor of the Treasury Department allowing a claim under the sugar bounty appropriation provisions of the Sundry Civil Expenses Appropriation Act. The Comptroller of the Treasury had without question paid all bounty claims arising under the original sugar bounty provisions. In view of the decision of the Court of Appeals of the District of Columbia, however, the Comptroller found it necessary to consider the constitutionality of the sugar claims appropriation provisions in the Sundry Civil Expenses Appropriation Act, in order to determine whether he should refuse payment of all claims thereunder on the ground of the unconstitutionality of the provisions. The Comptroller in an extensive opinion held (1) that he was empowered to decide constitutional questions; (2) that the original sugar bounty provisions were unconstitutional on the same grounds as set forth by the Court of Appeals of the District of Columbia; and (3) that, therefore, the appropriation provisions of the Sundry Civil Expenses Appropriation Act, being directed to the same end, were equally unconstitutional. The Comptroller, however, did not disallow the payments but, under sections 1063 and 1064 of the Revised Statutes, certified the constitutional questions to the Court of Claims for the decision of that court. Before the questions certified to the Court of Claims by the Comptroller of the Treasury were decided by that court, the Federal Circuit Court for the Eastern District of Louisiana rendered decisions in the cases of *United States* v. *Realty Company* and *United States* v. *Gay*, which were taken up to the United States Supreme Court. (See main text of brief above)

priation Act. The opinion established the following: (1) That, inasmuch as Congress had power to lay and collect taxes "to pay the debts" of the United States, it also had the power to appropriate the moneys raised for the same object; (2) that the power to pay debts of the United States was not confined to debts of a strictly legal character that could be enforced in a court of law but included debts or claims that rested upon merely equitable or moral obligations; (3) that such debts could arise out of an Act of Congress and reliance thereon even if the Act were entirely unconstitutional; and (4) that such a claim and the appropriating of moneys for its payment can "rarely, if ever" be the subject of review by the judicial branch of the Government.

Despite the fact that throughout the sugar bounty litigation the validity of the original sugar bounty provisions and of the Sundry Civil Expenses Appropriation Act was argued and decided below on the basis of public versus private purpose, the decision of this Court in the *Realty Company* case was rested not upon the Fifth Amendment or public or private purpose but upon Article I, Section 8, Clause 1, of the Constitution. So, in the instant case, it follows that the validity of the processing taxes, having regard to their objects of expenditure, should be determined with reference to the same constitutional provision and not with reference to the Fifth Amendment. The question before this Court, assuming *arguendo* that respondents may raise it, is whether the processing tax is one to provide for the general welfare of the United States. That being once decided, any question as to whether the tax by reason of the expenditure of its proceeds is for a private purpose and, in consequence, in violation of the Fifth Amendment is thereby likewise decided. A tax that provides for the general welfare is for a public, not a private, purpose.

(c) THE GENERAL WELFARE CLAUSE IS A LIMITATION ON THE FEDERAL TAXING POWER.

The general welfare clause is contained in the same constitutional provision that gives Congress the power to levy taxes. That provision of the Constitution states that—

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *" [Art. I, Sec. 8, Clause 1]

Three views have existed as to the construction of the general welfare clause:

The first view is that it is an independent grant of power to provide for the general welfare irrespective of the taxing powers or other enumerated powers.[21] This view is not urged by amicus curiae and is not necessary to the constitutional validity of the processing taxes.

The second view is that held by Hamilton. This view is set forth more fully below in this brief (pp. 58-59) in the quoted extracts of the argument upon the constitutional validity of pecuniary bounties, made by him in his Report on Manufactures. It was the view urged by members of the 2nd Congress in connection with the debate

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[21] That view, while not novel, has recently been vigorously urged. An example is the speech of Representative David J. Lewis upon the Sisson Resolution asking the House of Representatives to seek the advice of its Committee on the Judiciary as to whether the legislative power of Congress extends to the enactment of laws making provision for the general welfare of the United States and to insure the domestic tranquility. (Cong. Rec., daily ed., July 1, 1935, Appendix pp. 10975, 10979-10980) Representative Lewis' position is that the desk copy of General Washington, the President of the Constitutional Convention, showed a semicolon after the word "excises" and not a comma; that the copy was the one read and approved by the members of the Convention; that an error was made in substituting a comma for the semicolon by the copyist to whom it was turned over for writing out on parchment for engrossment; and that such an error is not binding in ascertaining the true text of the Constitution. For additional arguments supporting this view see J. F. Lawson's "The General Welfare Clause", and E. S. Corwin's "The Twilight of the Supreme Court", pp. 152-154 and footnotes thereto.

upon the cod fishery bounties enacted by that Congress. It was also adopted by Justice Story in his "Commentaries on the Constitution", Vol. I, 5th ed., secs. 912-913. Essentially, the view is that the general welfare clause is a limitation on the taxing power; that general welfare embraces matters other than those as to which Congress is given administrative or regulatory authority by other enumerated powers; that Congress may levy taxes to raise funds to be expended in providing for the general welfare subject only to the limitation that the object be general, not local, and that its operation extends, in fact or by possibility, throughout the Union and is not confined to a particular spot.

The third view is that held by Madison and set forth in this brief (pp. 62-63) in connection with the discussion of his argument on the constitutional validity of the Massachusetts cod fishery bounties enacted by the 2nd Congress. Madison, like Hamilton, held that the general welfare clause was a limitation on the taxing power but concluded that the general welfare embraced only those objects that came within the administrative or regulatory authority conferred upon Congress by the enumerated powers other than the taxing power. As will be set forth below in this brief, Madison, at the time of advancing this theory, voted for the Massachusetts cod fishery bounties but on the theory, which is scarcely borne out by the facts, that the bounty was in furtherance of the enumerated powers with respect to commerce and national defense.

Amicus curiae here urges the intermediate view held by Hamilton. This view falls within a literal application of the language of the constitutional provision, including its punctuation in the form in which it was adopted by the several States. It does no violence to the plain language of the Constitution and involves no additional grant of authority or limitation upon authority which, as in the other two views, may be founded only upon the failure to apply the constitutional language as plainly written.

The general welfare clause seems rather obviously to have been drawn from the Articles of Confederation. Article VIII of the Articles of Confederation provides—

> "All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states * * *"

The change made by the Constitution was not in the objects of appropriation but in the method by which the moneys were to be raised. Direct taxation was substituted for requisitions on the several States. Madison, in the debate on the cod fishery bounties in the 2nd Congress, after setting forth that "general welfare" was not a novel term but one repeatedly found in the old Articles of Confederation, asked the rhetorical question as to whether gentlemen ever supposed or suspected that Congress could give away the moneys of the States in bounties, to encourage agriculture or for any other purpose they pleased. (Pages 62-63, below) At a later date, however, Madison admitted that the practice under the Articles of Confederation had been in accord with Hamilton's view. In his letter to Andrew Stevenson of November 27, 1830, Madison wrote—

> "If the *practice* [italicized in original] of the Revolutionary Congress be pleaded in opposition to this view [the Madisonian view] of the case, the plea is met by the notoriety that on several accounts the practice of that Body is not the expositor of the 'Articles of Confederation.' These articles were not in force till they were finally ratified by Maryland in 1781. Prior to that event, the power of Congress was measured by the exigencies of the war, and derived its sanction from the acquiescence of the States. After that event, habit and a continued expediency, amounting often to a real or apparent necessity, prolonged the exercise of an undefined authority; which was the more readily overlooked, as the members of the body

> held their seats during pleasure, as its acts, particularly after the failure of the Bills of Credit, depended for their efficacy on the will of the States; and as its general impotency became manifest. Examples of departure from the prescribed rule, are too well known to require proof. * * *" ["The Writings of James Madison", Hunt ed., Vol. IX, p. 419]

Nicholas, in the Virginia Convention, after referring to the source of the general welfare clause in the Articles of Confederation, said—

> "The power in the Confederation to secure and provide for those objects [common defense and general welfare] was constitutionally unlimited * * *. The same power is intended by the Constitution. The only difference between them is, that Congress is, by this plan, to impose the taxes on the people, whereas, by the Confederation, they are laid by the states. * * *" [Elliot's "Debates on the Federal Constitution", Vol. III, p. 245]

Hamilton's view is supported not only by the plain language of the Constitution but by the long-continued legislative construction placed upon the clause in Congressional practice, as illustrated by subsequent legislation with respect to the cod fisheries and a great host of other appropriation Acts of Congress. These other Acts are set forth at length in the Government's brief (pp. 154-168 and appendix pp. 61-69) and are not repeated here. The cod fishery bounties legislation is, however, set forth in some detail below in this brief. (Pages 57 to 69) Hamilton's view is also supported by the use of the taxing power to encourage domestic industry through the protective tariff taxes held valid by this Court. This matter is set forth in this brief immediately following.

(d) THE PROTECTIVE TARIFF LAWS AND THE AGRICULTURAL ADJUSTMENT ACT BOTH PROVIDE FOR THE GENERAL WELFARE, THE LATTER SUPPLEMENTING THE FORMER.

It is submitted (1) that both the protective tariff duties and the processing taxes are excises having the same objectives—the production of revenue—and, in addition, the establishment of a domestic price level higher than the world price level for commodities of domestic production; (2) that this additional objective is accomplished in the one case through the imposition or threat of imposition of the tax and in the other through expenditure of an amount measured by its proceeds; (3) that both methods produce the higher domestic price levels by creating a scarcity in the supply of the commodity available for domestic consumption; (4) that the protective tariff duties are excises that provide for the general welfare and likewise the processing taxes, in supplementing the protective tariff system and making it effective for agriculture as well as manufacture, provide for the general welfare; and (5) that this Court has held the protective tariff duties valid despite their additional objective and should make a like holding as to the processing taxes. In case of a commodity, such as short staple cotton, a minor exception to the foregoing occurs. By reason of the dominant position of short staple American cotton in the world market and the lack of a tariff duty thereon, the operations under the Act do not confine the increased price level to the domestic market but increase the world price level.

Protective tariff duties upon imports of raw materials for industrial products or upon finished industrial products are necessarily disadvantageous to agriculture. Such tariffs tax imports of foreign commodities and increase the price of domestic commodities that the farmers buy; otherwise such tariffs are ineffective. Likewise, protective tariff duties upon imports of commodities used as a basis of exchange and payment for purchases of exports of agri-

cultural surpluses also are necessarily disadvantageous to agriculture. They destroy or tend to destroy foreign markets for our agricultural exports. These propositions are well brought out by the debates on proposed duties on steel and rum in the House of Representatives in the 1st Congress during the consideration of the first protective Tariff Act of July 4, 1789.

The protective tariff system throughout our whole political history has by many been regarded as of benefit to manufacture and of injury to agriculture. This view was well expressed at a later date (February 21, 1827) by Giles when, in a speech on the floor of the Virginia House of Delegates, he denied the accuracy of Clay's comparison of the "American System", advocated by Clay, with the system of British duties then in force. Giles pointed out that in Great Britain agriculture was on an import basis and that, in consequence, the corn laws laying duties on imports offered British agriculture efficient protection and insured them "an enormous bounty". The American farmer had no equivalent protection. Continuing, Giles declared—

> "The United States are an exporting country of bread stuff of all kinds, but particularly of wheat. No foreign country, therefore, can compete with us in that article, in our own markets. Yet, as a protection to American wheat-growers, a duty of 25 cents is laid upon the importation of foreign wheat—that is the whole protection * * *. That provision is perfectly inoperative, and of course, the promised protection, nominal. No foreign wheat is ever imported into the United States, and of course, no duty is ever paid. This was precisely the case before the passage of the tariff; and it now is. In the ordinary condition of the country, therefore, the tariff protection of agriculture, is merely nominal, and inoperative. There is but one condition of the country, in which, it could be operative. That would happen, only in case of scarcity; in which case, the wheat-grower, would be more burthened with the impost upon wheat, than any other

class in society. In the event of a scarcity, the farmer would require more imported grain—relatively than any other class of the community for his seed, and for his consumption, in consequence of his greater number of hands, and beasts of labor; and the farmer of course, would have more of the 25 cents duty to pay, than persons of any other occupations.

"Of what then does the *protection of agriculture consist?* In the ordinary condition of the country, it consists of nothing. In the extraordinary case of scarcity, which in all human probability never will happen, if consists of a duty, mainly upon the agriculturist himself. Of what does *the protection of manufactories* consist under the Tariff? *What is this protection made of.* It *consists of other people's money. It is made of other people's money.* The *protection of agriculture,* then consists of *burthens upon agriculture. The protection of manufactories* consists, *mainly of burthens upon agriculture*—high intolerable burthens upon agriculture. * * * In regard to its imitative character with British policy, it would be quite laughable, were it not for its mischievous, and destructive effects upon agriculture—The best interests of the country. By the *British protection, the British agriculturists are now receiving from the other classes of society, double prices for bread-stuffs,* beyond the prices of prohibited foreign bread-stuffs; whilst the *American agriculturists* receive *nothing;* and pay double prices to the manufacture for every article of consumption—even for the implements of husbandry, which are used to raise the bread for the manufacturer. * * *" [Italicized as in original—Giles' "Political Miscellanies", (1827) pp. 92-93]

Again, it is also obvious that when more of an agricultural commodity is produced at home than is consumed there tariffs upon that commodity will not affect the domestic price since imports will be negligible under any circumstances and since competition among domestic producers, if it exists, will bring the price down to whatever quotation obtains on the world market. For the decade prior to the enactment of the Agricultural Adjustment Act, this

country had an average annual production of cotton approximating 14,000,000 bales, of which about 8,000,000 bales were exported. Domestic production frequently exceeded even the world consumption of American cotton, and the world carry-overs of American cotton increased until on August 1, 1932, they equalled 12,960,000 bales. During this period, the domestic price decreased from 31 cents to 5.4 cents per pound and the total farm values of the cotton crops from approximately $1,500,000,000 to $350,000,000.[22] Tariff protection would afford no aid to cotton under such circumstances. In recognition of the export character of the crop, there is no customs duty imposed on short staple cotton.

Even the attempted high tariffs in the Emergency Tariff Act of 1921 and the Tariff Act of 1930 on other surplus agricultural commodities such as wheat, corn, and meat have been wholly ineffective in providing higher domestic price levels. The ad valorem equivalent of duties assessed under Schedule 7 (agricultural products) of the Tariff Act of 1922 during the year 1929, the last year it was in effect, was 22.9 per cent. The ad valorem equivalent of duties assessed under that schedule in the Tariff Act of 1930 during the year 1931, the first year it was in effect, was 42.14 per cent. While the ad valorem equivalent of the tariff rates was increased by some 90 per cent, farm prices for all agricultural commodities, following the world depression, were declining on a pre-war index basis from 146 to 65 and for cotton and cottonseed from 144 to 47.[23]

With the correctness of the view that the protective tariff system is, as a matter of economics, a disadvantage to those branches of agriculture producing surpluses in excess of do-

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[22] Hearings before the Committee on Finance, U. S. Senate, 72nd Cong., 2nd Sess., entitled "Investigation of Economic Problems", Feb. 13-28, 1933, pp. 124, 138, and 139; "Agricultural Adjustment in 1934", Govt. Printing Office (1935), pp. 45-46.

[23] See publication of U. S. Department of Agriculture, Bureau of Agricultural Economics, entitled "The Agricultural Situation", Vol. 19, No. 10, p. 20, issued October 1, 1935.

mestic needs, this Court, of course, has no concern. But with the fact that the Agricultural Adjustment Act was enacted to remove the inequality between industrial and agricultural prices and that, in the judgment of Congress, this inequality is in large measure attributable to discriminations against agriculture rising from the protective tariff system, this Court is concerned. The injury to the industry of the country that would have resulted from the abandonment of a protective tariff system is obvious. Congress chose, through the Agricultural Adjustment Act, to place agricultural prices on a parity with industrial prices, rather than reduce industrial prices to the low levels of agricultural prices. That these considerations were fundamental in the mind of Congress in the enactment of the Agricultural Adjustment Act not only is brought out by numerous speeches upon the floor of the two Houses during the consideration, over a decade, of legislation for the control of surplus agricultural production but is well stated by the agricultural committees in their reports. The House Committee on Agriculture in its report on the first surplus control legislation (H. Rept. 631, 68th Cong., 1st Sess.), in discussing "suggested remedies", said—

> "Duties as provided in general tariff schedules are effective in protecting the prices of commodities of which we import a considerable part of our supply. They are also relatively effective in the case of products of which we produce only for the domestic market, barring domestic overproduction, but they do not protect adequately products of which we export a surplus. We are the greatest producers of pork and pork products in the world. In 1923 we exported approximately $266,000,000 worth of such products. The world price determines the domestic price. When world conditions are disturbed and chaotic, and when the purchasing power of Europe, our chief outlet, is low, our prices are low, and result in ruin to hundreds of thousands of American farmers. We export approximately 20 per cent of our average wheat crop, either in the form of wheat or flour. The price our

grower receives is the Liverpool price minus the cost of delivering the product in Liverpool. This price pays no attention to internal conditions in the United States. The standard of living in America may be ever so high, or cost of labor prohibitive, the cost of the supplies and equipment that the farmer needs may be beyond his power to buy, but the Liverpool price is immune to any domestic American influence.

"The tariff protects domestic products against competition with imported products within the United States. But it can not protect a domestic product when competing in world markets with other products. The protective tariff is directed toward one problem. The McNary-Haugen bill is directed toward the other. The farmers seek, and this legislation seeks to give them, an instrumentality that will effectuate tariff protection for them just as the general schedule of tariff duties protects manufactured articles, and through them, the labor used in their production." [Pp. 29-30]

Again, the declared policy of the House and Senate bills[24] reported during that session, as stated in section 1 of each bill, was—

"to make more effective the operation of the tariff upon agricultural commodities, so that such commodities will be placed upon an equality under the tariff laws with other commodities, and to eliminate as far as possible the effect of world prices upon the prices of the entire domestic production of agricultural commodities, by providing for the disposition of the domestic surplus of such commodities."

Surplus control measures reported by the subsequent Congresses also indicate that the price disparity between industrial and agricultural commodities is, in the judgment of Congress, attributable in large measure to the effect of the tariff duties and that it is the purpose of such legislation to obtain for agriculture advantages equivalent to those given industry by the tariff, remove the disadvan-

[24] H.R. 12390 and S. 4206, 68th Cong., 2nd Sess. See, also, H. Rept. 1595, 68th Cong., 2nd Sess., p. 2, and S. Rept. 1234, 68th Cong., 2nd Sess., p. 2.

tages from which agriculture suffers by reason of the tariff upon industrial commodities, and make effective the protection intended by the tariff with respect to such agricultural commodities as are subject to protective tariff duties.[25]

In the session immediately preceding that in which the Agricultural Adjustment Act became law, there was passed by the House and reported in the Senate the surplus control measure from which the present processing tax was

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[25] See declaration of policy in section 1 of H.R. 11603, 69th Cong., 1st Sess., and the House report thereon. (H. Rept. 1003, pp. 2, 4)

Also, the bill passed in the 69th Congress, 2nd Session, included in its declaration of policy the preservation of advantageous domestic markets for agricultural commodities (S. 4808, Sec. 1) and the committee reports accompanying the bill stated that there was practically unanimous agreement that one of the two important causes of the condition of agriculture was the ineffectiveness of the existing tariff laws. (S. Rept. 1304, p. 8; H. Rept. 1790, p. 10) This measure was the so-called "First McNary-Haugen Bill".

In the 70th Congress, the so-called "Second McNary-Haugen Bill" contained a similar declaration of policy to the effect that one of the purposes of the bill was to preserve advantageous domestic markets for agricultural commodities (S. 3555, Sec. 1) and the committee reports again made reference to the relationship between the tariff laws and surplus agricultural commodities as being, along with seasonal variations in yield, the important cause for the condition in which agriculture found itself. (H. Rept. 1141, p. 14; S. Rept. 500, p. 7)

The proposals for control of the surplus agricultural commodities through the so-called "debenture plan" (see appendix, p. 137) also emphasized the tariff relationship in their declaration of policy and proposed, in effect, that the tariff duties upon industrial products should be used as the appropriations to pay for diverting surpluses of agricultural commodities to foreign markets. In the report of the minority of the committee advocating that plan (H. Rept. 1141, 70th Cong., 1st Sess., Part 3, pp. 5-6) protective tariff and surplus control measures were compared at length, and it was asserted that the debenture plan was no more a subsidy in principle than is the protective tariff.

In the Farm Board Act passed by the 71st Congress and approved by President Hoover, one of the declared purposes was again the preventing and controlling of surpluses so as to maintain advantageous domestic markets (46 Stat. 11, Sec. 1), and the Senate committee in its report set forth the situation in which agriculture found itself by reason of the protection afforded by the tariff to industry in its prices for domestic commodities and the little real protection afforded to agricultural commodities which produced surpluses in excess of domestic requirements. (S. Rept. 3, 71st Cong., 1st Sess., pp. 3-4)

Through all this period, as well as during the 72nd Congress, the debates on the floors of the two Houses show how fully Congress had it in mind that the surplus control legislation was supplemental to the protective tariff.

taken. Both the House and Senate committees in their reports upon the bill made reference to the existing discriminations against agriculture, emphasizing the tariff situation. The House committee said—

> "No direct tariff can place such commodities [i. e., the major farm commodities] on a basis of equality with industrial products that for many years have had the benefit of tariff protection. Agricultural tariffs have almost without exception proved ineffective. Yet tariff rates on industrial articles which the farmer buys, and the cost of such articles to him, have greatly advanced. The result has been that the producers of agricultural commodities must bear the burden of the tariff without receiving its advantages. * * *"[26]
> [H. Rept. 1816, 72nd Cong., 2nd Sess., p. 2]

In presenting to the House the rule for the consideration of the Agricultural Adjustment Act the chairman of the Rules Committee, Mr. Bankhead, set forth the situation of the farmer under the protective tariff system as follows:

> "For a great number of years the farmers of certain sections of this country were induced to believe that their interests were properly safeguarded and protected under the protective tariff system and that all they had to do in order to continue their prosperity was to continue the high protective tariff system for agricultural products; but it seems that after many decades of trial as to the efficacy of this remedy at least a great proportion of them ultimately came to the conclusion that it was a broken staff upon which to lean. No doubt by virtue of their practical experience under the operation of this system, they came to the conclusion and ultimately learned that although rather large protective duties were laid for the protection of their products under the Fordney bill and other bills, yet in view of the fact they had to buy everything they consumed in a highly protected mar-

[26] For similar statement by the Senate Committee on Agriculture and Forestry, see S. Rept. 1251, 72nd Cong., 2nd Sess., p. 1.

ket and had to rely upon the fixing of the prices of their products in the free and open markets of the world they were not, as as matter of fact, being protected in their interests under such a system."[27] [77 Cong. Rec. 665]

The Agricultural Adjustment Act is primarily a measure to bring about such increase in agricultural prices as will compensate for the disadvantages suffered by agriculture by reason of the protective tariff upon industrial commodities that farmers buy. It makes effective the present tariff protection for producers of such agricultural commodities as are covered by tariff duties and, in the case of agricultural commodities not so covered, gives an equivalent advantage. The yardstick for measuring these aims is the equality of agricultural and industrial price levels declared as the policy of the Act. (Sec. 2)

The protective tariff case.—This Court has held the protective tariff valid as an exercise of the Federal taxing power. (*J. W. Hampton, Jr. & Co.* v. *United States,* (1928) 276 U. S. 394) No distinction was drawn between the revenue and protection paragraphs of the Tariff Act of

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[27] Mr. Connally, during the debate in the Senate, said—

"But the Senator from Pennsylvania must admit that every piece of tariff legislation that has been enacted in the United States for the past 50 years has been based on the plea that it was in behalf of American industrial labor, the man in the shop, the man in the factory. The tariff exactions on the farmer were extorted from him on the pretext that he must let labor in the factories get a larger wage, shorter working hours, better living conditions, at the expense of the American farmer. All of us know that the tariff bears more heavily upon agriculture than upon any other industry. All of us know that the tariff benefits for agriculture are infinitesimal. We know we cannot give to agriculture generally, except in a few of its branches, any substantial benefits by tariff legislation, particularly in the case of those commodities which are exportable. No tariff will aid agricultural commodities of which we produce an exportable surplus because the surplus which is sold abroad controls the price of the domestic market here at home. If it is fair for us to enact legislation for 75 years in behalf of the industrial workers, why can we not now at least make a genuine effort, a respectable effort, toward a program in behalf of agricultural labor?" [77 Cong. Rec. 1647]

1922 under consideration in that case. The protective tariff provides a higher price level for products of our industry domestically consumed than for such products when exported from this country or for similar products when imported into this country. The domestic consumer pays this higher price. Nevertheless, the incidental motive, in many paragraphs of the Act, of protecting domestic industries from world price levels for their products when consumed on the domestic market, did not invalidate the tax.

The processing taxes provided in the Agricultural Adjustment Act have precisely the same effect as the protective tariff taxes. The sole distinction is as follows: The protective tariff taxes obtain their effect by the fact of their imposition or threat of imposition, and it is obvious that the greater the advantages afforded by them to domestic producers the less the revenue. The processing taxes obtain their effect by the expenditure of an amount measured by their proceeds, but it is also obvious that the greater the advantages afforded by such taxes to the domestic producers of agricultural commodities the greater the yield from such taxes.

In the *Hampton* case, Chief Justice Taft said—

> "It undoubtedly is true that during the political life of this country there has been much discussion between parties as to the wisdom of the policy of protection, and we may go further and say as to its constitutionality, but no historian, whatever his view of the wisdom of the policy of protection, would contend that Congress since the first Revenue Act in 1789 has not assumed that it was within its power in making provision for the collection of revenue to put taxes upon importations and to vary the subjects of such taxes or rates in an effort to encourage the growth of the industries of the nation by protecting home production against foreign competition. It is enough to point out that the second act adopted by the Congress of the United States July 4, 1789 (chap. 2, 1 Stat. at L. 24), contained the following recital:

" 'Sec. 1. Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandises imported:

" 'Be it enacted, etc.'

"In this first Congress sat many members of the Constitutional Convention of 1787. This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. *Myers* v. *United States*, 272 U. S. 52, 175, and cases cited. The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection since the Revenue Law of 1789 are matters of history.

"More than a hundred years later, the titles of the Tariff Acts of 1897, and 1909 declared the purpose of those acts, among other things, to be that of encouraging the industries of the United States. The title of the Tariff Act of 1922, of which § 315 is a part, is, 'An Act to Provide Revenue, to Regulate Commerce with Foreign Countries, to Encourage the Industries of the United States and for Other Purposes.' Whatever we may think of the wisdom of a protection policy, we can not hold it unconstitutional." [Pp. 411-412]

The protective tariff taxes have established a domestic price level higher than the world price level for the benefited commodities. The Agricultural Adjustment Act seeks, through expenditures made under the Act, to establish a higher domestic price level for agricultural commodities. It is submitted that if, under the *Hampton* case, customs duties levied for the admitted purpose of increasing domestic price levels for industrial products are constitutionally valid notwithstanding the limitations of the general welfare clause, then processing taxes levied to provide funds to increase domestic price levels for agricultural products are likewise valid notwithstanding the limitations of that

clause. Revenue is present in each instance, more in case of the processing tax than the protective tariff duty paragraphs. A constitutional difference should not lie merely because the advantage to domestic industry is obtained in one case through imposition, or more often threat of imposition of the tax, and in the other through expenditure of its proceeds. However, if it be said that a distinction lies in that the proceeds of the processing tax are parcelled out for the benefit of members of particular agricultural industries, so, also, it may be answered that the rates of the protective tariff taxes are parcelled out for the benefit of members of particular manufacturing industries. The only difference in substance is, as heretofore stated, that in the one case the objective is attained through the imposition or threat of imposition of the tax and in the other through the expenditure of its proceeds or of an amount equivalent thereto.

It is implicit in the decision in the *Hampton* case that the protective taxes there considered were for the general welfare, despite their advantage to industry. The processing taxes are likewise for the general welfare, despite their advantage to agriculture. In the one case, the cost to the public is composed of the taxes on importers of foreign industrial products plus increased prices for domestic industrial products; in the other, it is composed of the taxes on processors of agricultural products and on importers of competing articles plus increased prices for domestic agricultural products. In either case, the public foots the bill in the interest of the welfare of the nation as a whole. On the one hand, the *Hampton* case is authority for the use of the taxing power to accomplish objectives such as those of the Agricultural Adjustment Act; on the other, the Act is legislation "necessary and proper" to carry out fairly and reasonably, in the interest of the general welfare, the protective tariff laws.

(e) THE COD FISHERY BOUNTIES ARE A CONTROLLING LEGISLATIVE PRECEDENT.

The first protective Tariff Act of July 4, 1789 (1 Stat. 24), to which Chief Justice Taft referred in his opinion in the *Hampton* case (see p. 54, above), established a bounty as well as a protective tariff. Section 4 of that Act provided[28]—

> "Sec. 4. *And be it* [*further*] *enacted by the authority aforesaid,* That there shall be allowed and paid on every quintal of dried, and on every barrel of pickled fish, of the fisheries of the United States, and on every barrel of salted provision of the United States, exported to any country without the limits thereof, in lieu of a drawback of the duties imposed on the importation of the salt employed and expended therein, viz:
>
> "On every quintal of dried fish, five cents.
> "On every barrel of pickled fish, five cents.
> "On every barrel of salted provision, five cents."

These payments to aid the Massachusetts cod fishing industry were not a drawback but "in lieu of a drawback" on any imported salt used in curing the fish or provisions exported. The bounties were required to be paid irrespective of the amount of salt used or whether, as might be in the case of dried fish, any salt was used; and also irrespective of whether the salt used was duty-paid imported salt or was salt produced in the United States. At the time, the customs duties were the only source of income adequate to pay the bounty.[29] In effect, a portion of these duties was dedicated to the payment of the bounty.

In the following year, 1791, Secretary of the Treasury Hamilton made to the 2nd Congress his Report on Manufactures, and Jefferson, Secretary of State, his Report on the Fisheries. Among the methods urged by Hamilton to

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[28] See, also, 1 Stat. 46, sec. 33. In the second session of the 1st Congress, the second Tariff Act passed by Congress provided for the continuation of the bounty with both the rate of duty on salt and the rate of the payments being doubled. (Act of August 10, 1790, 1 Stat. 180, 181-182)

[29] See Annual Report of the Secretary of the Treasury, 1932, p. 362.

encourage increased production in manufacture and agriculture were "pecuniary bounties". In his report, Hamilton recognized the prejudice against bounties, stating—

> "There is a degree of prejudice against bounties from an appearance of giving away the public money, without an immediate consideration, and from a supposition that they serve to enrich particular classes at the expense of the community. But neither of these sources of dislike will bear serious examination. * * *
>
> "As to the second source of objection, it equally lies against the other modes of encouragement which are admitted to be eligible. As often as a duty upon a foreign article makes an addition to its price, it causes an extra expense to the community, for the benefit of the domestic manufacturer. A bounty does no more. But it is the interest of the society, in each case, to submit to a temporary expense, which is more than compensated by an increase of industry and wealth, by an augmentation of resources and independence, and by the circumstance of eventual cheapness, which has been noticed in another place." [3 Annals of Congress, Appendix, p. 1011]

Later in his report, Hamilton set forth his famous constitutional argument in support of bounties—

> "A question has been made concerning the constitutional right of the Government of the United States to apply this species of encouragement, but there is certainly no good foundation for such a question. The National Legislature has express authority 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare,' with no other qualifications than that 'all duties, imposts, and excises, shall be uniform throughout the United States;' that no capitation or other direct tax shall be laid unless in proportion to numbers ascertained by a census or enumeration, taken on the principles prescribed in the Constitution, and that 'no tax or duty shall be laid on articles exported from any State.'
>
> "These three qualifications excepted, the power to raise money is plenary and indefinite; and the objects

to which it may be appropriated are no less comprehensive, than the payment of the public debts, and the providing for the common defence and general welfare. The terms 'general welfare' were doubtless intended to signify more than was expressed or imported in those which preceded; otherwise, numerous exigencies, incident to the affairs of a nation, would have been left without a provision. The phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union to appropriate its revenues, should have been restricted within narrower limits than the 'general welfare;' and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition. It is therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper; and there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the National Councils, as far as regards an application of money.

"The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object to which an appropriation of money is to be made, be general, and not local; its operation extended, in fact or by possibility, throughout the Union, and not being confined to a particular spot.

"No objection ought to arise to this construction from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing, not authorized in the Constitution, either expressly or by fair implication." [Pp. 1011-1012]

During the course of his report, Hamilton advocated a bounty upon the domestic manufacture of domestic cotton (pages 1027-1028) and also urged that—

"The true way to conciliate these two interests [manufacture and agriculture] is, to lay a duty on foreign manufactures of the material, the growth of which is desired to be encouraged, and to apply the produce of that duty by way of bounty, either upon the production of the material itself, or upon its manufacture at home, or upon both. * * *" [P. 1010]

Thus, Hamilton was an advocate of bounties to producers of agricultural commodities, payable out of customs duties upon competing foreign articles.

Jefferson, in his Report on the Fisheries ("American State Papers—Commerce and Navigation", Vol. 1, p. 8), among other matters, set forth the advantages which our fisheries had over those of Newfoundland sufficient to make national support unnecessary if a "vent for our fish can be procured". Then, referring to the disadvantages to our fisheries resulting from the protective tariff, he left to the wisdom of Congress the necessity for a "bounty" to the fishermen. His comment was as follows:

"Of the disadvantages opposed to us, those which depend on ourselves, are—

"Tonnage and naval duties on the vessels employed in the fishery.

"Impost duties on salt.

"On tea, rum, sugar, molasses, hooks, lines, and leads, duck, cordage, and cables, iron, hemp, and twine, used in the fishery; coarse woollens, worn by the fishermen, and the poll tax levied by the State on their persons. The statement No. 6, shows the amount of these, exclusive of the State tax and drawback on the fish exported, to be $5 25 per man, or $57 75 per vessel of sixty-five tons. When a business is so nearly in equilibrio that one can hardly discern whether the profit be sufficient to continue it or not, smaller sums than these suffice to turn the scale against it. To these disadvantages, add ineffectual duties on the importation of foreign fish. In justification of these last, it is urged that the foreign fish received, is in exchange for the produce of agriculture. To which it may be answered, that the thing given, is more merchantable

than that received in exchange, and that agriculture has too many markets to be allowed to take away those of the fisheries. It will rest, therefore, with the wisdom of the Legislature to decide, whether prohibition should not be opposed to prohibition, and high duty to high duty, on the fish of other nations; whether any, and which, of the naval and other duties may be remitted, or an equivalent given to the fisherman, in the form of a drawback, or bounty; * * *'' [P. 9]

It was with these reports and arguments before it that the 2nd Congress approached the problem of relief for the Massachusetts cod fishing industry.

Whether or not the legislation of 1789 and 1790 with respect to the cod fishing industry had been intended as a bounty or as relief from the disadvantages of the tariff is a difference without pertinent distinction. Unquestionably, the legislation provided for direct payments to the industry from the Treasury. Recognizing, however, that the relief provided was inadequate, Congress, in the Act of February 16, 1792 (1 Stat. 229), repealed the bounty on exported fish and other salted provisions and substituted for it a bounty on tonnage of the cod fishing vessels. The tonnage bounty was at the rate of $1.50 per ton for fishing vessels of 20 to 30 tons burden according to the admeasurement; $2.50 per ton if over 30 tons burden; and $1.00 per ton for vessels of more than 5 but less than 20 tons burden. The bounty was payable to the owner and crew of the vessel, provided the vessel was at sea for at least four months of the year in the bank or other cod fisheries. The bounty was also subject to a maximum of $170 per vessel. The smaller vessels from 5 to 20 tons burden were subject to a production requirement that the catch must be not less than 12 quintal of fish per ton of admeasurement to be entitled to the bounty.

Less than three months later, the same Congress, at the same session, passed the Act of May 2, 1792 (1 Stat. 259), under which the tonnage bounty payments with respect to

the cod fishing vessels were increased 20 per cent. At the same time, the bounty on exported fish in lieu of drawback under the Acts of 1789 and 1790, which had been superseded, was restored, but at somewhat lower rates, on pickled fish and other salted provision but not on dried fish. Thus, as a result of the legislation in the 2nd Congress, both the bounty on exported fish in lieu of drawback and the tonnage bounty were in effect at the same time for the benefit of the cod fishing industry.

Not only does the sequence of legislative events through 1792 indicate that the various Acts were regarded as bounty Acts but the debate on the Act of February 16, 1792, contains like indications. It was in connection with this Act of 1792 that there occurred the strenuous constitutional debate on bounties referred to by Justice Story in his "Commentaries on the Constitution", 5th ed., sec. 991.

During this debate, Madison advocated his doctrine of appropriations only to carry out the enumerated powers. It constitutes a response to Hamilton's argument in support of the constitutionality of bounties. Madison first drew a "material" distinction between "an allowance as a mere commutation and modification of a drawback, and an allowance in the nature of a real and positive bounty". He also drew a second distinction "as a subject of fair consideration at least" between "a bounty granted under the particular terms in the Constitution, 'a power to regulate trade,' and one granted under the indefinite terms". The tonnage bounty proposed he held to be a drawback, "a mere reimbursement of the sum advanced * * * only paying a debt". The assertion of power to grant bounties for anything Congress might "think conducive to the 'general welfare'" raised a fundamental and important question. That power he denied. The new Government was one of limited powers. "General welfare" was not a novel term but one repeatedly found in the old Articles of Confederation. He asked gentlemen whether it was ever supposed or suspected that Congress could give away the moneys of

the States in bounties, to encourage agriculture or for any other purpose they pleased.[30] The power claimed would permit Congress to establish courts with cognizance of suits between citizen and citizen and in all cases whatsoever. The Congress could then make expenditures for religion, education, and roads. (3 Annals of Congress 386-387[31])

Certain of the supporters of the bill, such as Goodhue and Gerry, denied that the bill provided a bounty but, within a few weeks, voted for another measure which included an increase of the tonnage bounty as well as a restoration of the bounty on exported pickled fish and other salted provisions. Madison, who voted for the tonnage bounty bill, voted against this subsequent measure. However, the large majority of those who participated in the debate regarded the measure as providing a bounty for the fisheries.[32]

The drawback analogy seems an obvious cloak to attract votes. As passed by the Senate, the bill which became the

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[30] For Madison's admission that the practice of Congress under the Articles of Confederation was contrary to his interpretation of "general welfare", see quotation, pages 43-44 of this brief.

[31] Giles earlier in the debate had said the proposed legislation might be constitutional under the doctrine of "ways and end", i. e., implied powers, but that there was a great difference between encouragement and direct bounty. Any advantage resulting to a particular organization connected with commerce "comes within that authority; but when a bounty is proposed to a particular employment or occupation, this is stepping beyond the circle of commerce; and such a measure will affect the whole manufacturing and agricultural system". (3 Annals of Congress 363) Additional arguments against the proposed legislation were those of Page, who held that Congress was not entrusted with power to regulate exports or to lay any tax which could operate unequally on the States (Id. 391), and of Williamson, who urged that a tax was not uniform unless the money was distributed uniformly. (Id. 379)

[32] All the opponents of the measure so held. (3 Annals of Congress 363, 398 (Giles); 367 (White); 374 (Murray); 378-382 (Williamson); 395 (Page)) At the same time, some of the proponents insisted that the proposed payments were only "in another mode, the usual drawback". (Id. 366 (Goodhue). See, also, Id. 376 (Gerry); 385 (Laurance); 386 (Madison)) Others of the proponents admitted or did not deny that the proposed Act was bounty legislation. (Id. 368, 370 (Ames); 375 (Barnwell); 384 (Livermore))

Act of July 4, 1789, referred to "the bounty now allowed upon the exportation of dried fish". (3 Annals of Congress 66, Sec. 1) In the House, however, the proponents agreed to and did substitute "allowance" for the term "bounty"—"by way of accommodation" according to the reporter. (Id. 374) White asked for an amendment making the drawback such "in fact, as well as in words". (Id. 367) Williamson asserted "we are perfectly agreed—that the money to be paid will be more than that received" from the duties (Id. 378) and Giles that "there can be no comparative value between the drawback and the bounty". (Id. 365)

The opponents to Madison's views urged, in accordance with the argument made by Hamilton in his Report on Manufactures, that bounties were permissible under the power to tax to provide for the general welfare. The purpose of the legislation was said to be to rehabilitate the Massachusetts cod fishing industry. Jefferson's report to Congress on the cod fisheries had been made pursuant to a memorial from the Marblehead fishermen received by Congress and referred to Jefferson. In this it was set forth, among other matters, that 33 vessels had been withdrawn from the cod fisheries because of the unprofitableness of the industry. Other purposes of the legislation were said to be to provide "a copious nursery of hardy seamen", thereby as a national defense measure supplementing the personnel of the coastwise and overseas trade; to increase the national wealth by developing fisheries; and to promote foreign trade through exchange of our fish for imports from the West Indies. To the extent that these purposes may fall within the enumerated powers of Congress, the arguments of the members of the House advocating the Hamiltonian doctrine may, in a strictly judicial sense, be dicta. They are, nevertheless, the arguments of a Congress which contained many of those who participated in the formulation or adoption of the Constitution. Furthermore, the encouragement of agriculture has as di-

rect relation to the national defense, the wealth of the nation, and our foreign trade as has the encouragement of the cod fisheries.

The argument of Barnwell is typical of those who supported bounties. He urged that people must trust the exercise of the power of granting bounties to their representatives and that—

> "whenever the two Houses of Congress and the President of the United States are of opinion that the general welfare will be promoted by raising any sum of money, they have undoubted right to raise it, provided that the taxes be uniform; * * * whatever allowance or bounty is granted upon any particular commodity, must ever be paid by the whole, for the advantage of a part, whether it be upon cotton to the Southward, upon fish to the Eastward, or upon other commodities to the middle States; * * * " [3 Annals of Congress 375]

In addition, Gerry and Laurance argued that the protective tariff constituted a legislative precedent for the pending bounty. Gerry said that the payments were "a bounty on occupation * * * an indulgence similar to what has been granted the landed and agricultural interests". He continued—

> "We have laid on hemp a duty of fifty four cents per hundred weight; and on beer, ale, and porter, five cents per gallon. Now, I ask gentlemen, whether the professed design of those duties was to raise a revenue, or to prevent the importation of those articles? they were laid for no other purpose, than to prevent foreigners from importing them, and thereby to encourage our own manufactures; and was not that encouragement a bounty to the persons concerned in producing such articles in this country? If the duties had not been laid, the importer could sell much cheaper than he now can; and the landed interest would be under a necessity of selling cheaper in proportion. If those prohibitory duties operate as a bounty in favor of raising hemp, and

of brewing beer, ale, and porter, I ask, whether, if a bounty were proposed on every quintal of fish, it might not, with the same propriety, be granted? If we have not a right to grant a bounty in the one case, we have as little right to grant it in the other.''[33] [3 Annals of Congress 376]

Following the debate, the tonnage bounty Act passed the House and became law. Except for a brief interval from 1807 to 1813, bounties for the benefit of the cod fishing industry continued in effect at increasing rates, despite reduction in salt duties, until 1866.[34]

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[33] Laurance's argument was—

''Have we not laid extra duties on various articles, expressly for the purpose of encouraging various branches of our own manufactures? These duties are *bounties* to all intents and purposes, and are founded on the idea only of their conducing to the *general interest*. Similar objections to those now advanced were not made to these duties. They were advocated, some of them, by gentlemen from the Southward. He traced the effects of these duties, and showed that they operated fully as indirect bounties.

''Mr. L. then adverted particularly to the Constitution, and observed that it contains *general* principles and powers only. These powers depend on *particular* laws for their operation; and on this idea, he contended that the powers of the Government must, in various circumstances, extend to the granting bounties. He instanced, in case of a war with a foreign Power, will any gentleman say that the General Government has not a power to grant a bounty on arms, ammunition, &c., should the general welfare require it? The general welfare is inseparably connected with any object or pursuit which in its effects adds to the riches of the country. He conceived that the argument was given up by gentlemen in opposition to the bill, when they admit of encouagement to the fishermen in any possible modification of it. * * *'' [Italicized as in original—3 Annals of Congress 385]

[34] In 1797, the duty on salt was increased to 20 cents a bushel, the bounty on exported pickled fish and other provisions to 12 cents and 10 cents per barrel, respectively, and the existing tonnage bounty on cod fishing vessels was increased by one-third. (1 Stat. 533) The Act was to remain in effect for two years but in 1800 was extended for a further period of ten years. (2 Stat. 60)

In 1807, the duty on salt was repealed and also the ''bounty'' on exported pickled fish and other salted provisions and the tariff bounty on cod fishing vessels. (2 Stat. 436) In 1813, however, the duty of 20 cents a bushel on salt was renewed, the bounty on exports of pickled fish reestablished at a higher rate of 20 cents a barrel, and the tonnage bounty reestablished at the rates under the 1797 and 1800 Acts. (3 Stat. 49) The new Act was to continue in force until the termination of the war with Great Britain, but this limitation was removed and the bounties made permanent in 1816. (3 Stat. 254)

In summary, the bounties for the cod fishing industry originated as part of the first protective tariff legislation, the second Act of the 1st Congress. Their purpose was to offset the disadvantages of the protective tariff to the Massachusetts cod fishing industry and to encourage the development of that industry. In origin they had little genuine relation to a drawback on salt, and in the 2nd Congress, and thereafter for three-quarters of a century, their "bounty" characteristics are obvious even if no more than the face of the several statutes is consulted.

Chief Justice Taft in his opinion in the *Hampton* case,[35] sustaining the protective tariff, relied primarily on the fact that such tariffs were a well-established legislative practice originating, as he pointed out, with the first Tariff Act (the same Act that provided the original cod fishery bounty). The Chief Justice further said—

> "This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively parti-

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In 1819, the tonnage bounty was increased while the duty on salt and the bounty on exported pickled fish remained unchanged. In 1824, the bounty was extended to the cod fishing vessels even though wrecked during the voyage. (4 Stat. 38)

In 1830, the duty on salt was reduced to 15 cents per bushel for the year 1831 and thereafter to 10 cents per bushel (4 Stat. 419) and was continued at the rate of 10 cents per bushel by the Tariff Act of 1832. (4 Stat. 589)

In 1842, the duty was still further reduced to 8 cents per bushel (5 Stat. 559) and in 1846 reduced to 20 per cent ad valorem. (9 Stat. 46) During all this period, however, the bounty on exported pickled fish and the tonnage bounty on cod fishing vessels suffered no corresponding reduction but remained in effect without change.

Under the 1846 Act, the "bounty heretofore authorized by law to be paid on the exportation of pickled fish" was replaced by a genuine drawback of the duty on the foreign salt used in preparing the fish for export. (9 Stat. 43) The tonnage bounty on the cod fishing vessels continued without change, however, until 1866, at which time all laws "allowing fishing bounties" were repealed. The bounty character of these payments on tonnage of the cod fishery vessels and on exported pickled fish is obvious from the course of the legislation.

[35] *J. W. Hampton, Jr. & Co.* v. *United States*, (1928) 276 U. S. 394.

> cipating in public affairs, long acquiesced in, fixes the construction to be given its provisions. * * *" [P. 412]

The bounties for the benefit of the cod fishing industry are also a legislative exposition of the Constitution at a time when the founders of our Government and the framers of our Constitution were actively participating in public affairs. The bounties were long acquiesced in, over three-quarters of a century.

Madison attempted to distinguish the tonnage bounty, in the debate in the 2nd Congress, as being a bounty to carry out the enumerated powers and voted for it as being a mere commutation of drawback. Any reasonable interpretation of the debate during the 2nd Congress shows that this was not the fact, and the same Congress increased the bounty within three months to such an extent that Madison voted against it. A bounty for the benefit of the cod fishing industry is no more an appropriation to carry out enumerated powers than are the payments made to agriculture under the Agricultural Adjustment Act. It is submitted that encouragement of cod fishing is no more a matter of commerce or of national defense than is encouragement of agriculture. Each has a relation to trade and each is necessary to the national defense. Quantitatively speaking, agriculture's value and relationship to trade and national defense, then as now, greatly exceeds that of the cod fisheries.

The decision in the *Hampton* case is a direct precedent for the constitutional validity of the expenditures under the Agricultural Adjustment Act. The doctrine of contemporaneous legislative exposition is as applicable to bounty as to protective tariff legislation. In addition, the type of expenditures made to date under the Agricultural Adjustment Act for the cotton program have a feature not present in the bounties for the benefit of the cod fishing industry, namely, the expenditures are pursuant to contrac-

tual arrangements between the Government and the farmer, under which the farmer has a definite commitment to reduce acreage or production. The payments are not mere gratuities but involve a *quid pro quo*.

(f) THE APPROPRIATIONS UNDER THE ACT ARE FOR THE GENERAL WELFARE.

(*1*) *The objects of the appropriations.*—Section 12(b) of the original Act provides, in addition to the expenditures for administrative expenses and refunds on taxes, four objects of expenditure of processing tax receipts for carrying out surplus control programs. These objects of expenditure are (section 8(1) and section 12(b))—

1. Expenditures for expansion of markets and removal of surplus agricultural products.
2. Bounty payments upon that part of the production of any basic agricultural commodity required for domestic consumption.
3. Contractual rental and benefit payments for reduction in acreage or reduction in production for market, or both, of any basic agricultural commodities, through agreements with producers or by other voluntary methods.
4. Reimbursement of Treasury for advances for items 2 and 3 and for administrative expenses and tax refunds under the Act.

These objects of expenditure are to be sharply differentiated. The cotton processing tax is available for any or all of these objects of expenditure but each of the objects of expenditure involves in some respects different constitutional considerations. Actually (see p. 34 above), the proceeds from the cotton processing taxes have all been expended for reimbursement of advances from the general funds of the Treasury (i. e., item 4 above) made for admin-

istrative expenses and tax refunds and for contractual rental and benefit payments. These contractual payments are of two kinds: First, rental payments for reduction of acreage based on average yield of the land during a base period; and, second, benefit or "parity" payments for reduction of acreage based on the portion of the farmer's production considered as moving into domestic consumption.[36] No expenditures of cotton processing taxes have been made for items 1 and 2, or directly for item 3.

Moreover, under section 12(b), as amended August 24, 1935, expenditures for administrative expenses, tax refunds, bounty payments, and contractual rental and benefit payments are to be made from an appropriation from the general funds of the Treasury of an amount equal to the proceeds of the processing taxes. The processing taxes are no longer directly appropriated for these purposes. Further, the provisions making the processing taxes available for expenditures for expansion of markets and removal of surpluses is superseded by section 32 of the amendatory Act of August 24, 1935. That section appropriates 30 per cent of the gross receipts from customs duties to—

> "(1) encourage the exportation of agricultural commodities and products thereof by the payment of benefits in connection with the exportation thereof or of indemnities for losses incurred in connection with such exportation or by payments to producers in connection with the production of that part of any agricultural commodity required for domestic consumption; (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal channels of trade and commerce; and (3) finance adjustments in the quantity planted or produced for market of agricultural commodities. * * *"

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[36] "Agricultural Adjustment in 1934", Govt. Printing Office (1935), pp. 46-49.

(2) *General welfare does not depend on whether the tax proceeds become general funds of the Treasury.*—A tax is one to provide for the general welfare of the United States if its proceeds are to be used for the general welfare. (Cf. p. 25, above) The proceeds of a tax levied by the Federal Government are almost without exception covered into the Treasury of the United States. Customarily, and in the absence of any restriction imposed by Congress, the proceeds of the tax, as a matter of bookkeeping, are credited to the general funds of the Treasury. The dollars received from a particular tax are not customarily earmarked for a particular expenditure and segregated. It is therefore ordinarily impossible to test the question as to whether a tax is one to provide for the general welfare, by discovering the particular expenditure met by the use of the proceeds of the particular tax. All that can be said is that the expenditure is made from the general funds in the Treasury and that those general funds are composed of receipts from the particular tax and all other taxes, receipts from bond issues and other Treasury obligations, and receipts from other sources not involving taxation. In consequence, if the proceeds from a tax are credited to the general funds of the Treasury, such a tax provides for the general welfare for, obviously, the purpose to which its proceeds went is not discoverable and the presumption is that they were among those appropriated and expended for an object within the general welfare. This must be true even though among the numerous appropriations made by Congress there may be some which are not, strictly speaking, for the general welfare.

In the case of the processing taxes their proceeds are likewise covered into the Treasury. But under the original Act the proceeds were segregated. They were appropriated for administrative expenses, tax refunds, and bounty and contractual payments under the Act. They were also appropriated to reimburse the Treasury for ad-

vances for such purposes and, in actuality, they have been expended only for reimbursement of such advances. (See page 34, above)

In order for a tax to be one to provide for the general welfare it is not necessary that its proceeds be credited to the general funds of the Treasury. Congress has frequently earmarked particular tax proceeds for particular objects of expenditure. Thus, in the 1st Congress, section 60 of the Act of March 3, 1791, 1 Stat. 199, 213, laying import duties and internal revenue taxes upon distilled spirits, provided—

> "That the nett product of the duties hereinbefore specified, * * * is hereby pledged and appropriated for the payment of the interest of the several and respective loans which had been made in foreign countries, prior to the fourth day of August last; and also upon all and every the loan and loans which have been and shall be made, and obtained pursuant to the act, intituled 'An act making provision for the debt of the United States;' * * * and subject to this farther reservation, that is to say—Of the nett amount or product during the present year, of the duties laid by this act, * * * to be disposed of towards such purposes for which appropriations shall be made during the present session."

The Act then continued—

> "And to that end that said monies may be inviolably applied in conformity to the appropriation hereby made, and may never be diverted to any other purpose until the final redemption, or reimbursement of the loans or sums for the payment of the interest whereof they are appropriated, an account shall be kept of the receipts and disposition thereof, separate and distinct from the product of any other duties, impost, excise, and taxes whatsoever, except those heretofore laid and appropriated to the same purposes."

There were similar Acts in the early Congresses, dedicating the proceeds of a particular tax to a particular object of expenditure.[87]

As heretofore set forth (page 35), it should make no constitutional difference if Congress levied the processing tax in a separate Act and provided that its proceeds should be credited to the general funds of the Treasury and then in the Agricultural Adjustment Act appropriated from general funds of the Treasury amounts sufficient for the expenditures under that Act. In other words, a tax, even though the proceeds are earmarked as to their use, is as much for the general welfare as one not so earmarked. The total Government expense must be met from the total Government receipts, and earmarking of particular tax proceeds for one purpose merely frees other tax proceeds for other purposes.

However, even if earmarking of the proceeds of the processing taxes were a constitutional objection to the validity of the taxes, the objection no longer exists. As heretofore pointed out (page 29), the processing taxes are no longer appropriated for the purposes of the Act. Their proceeds are merely a part of the general funds of the Treasury and serve as a measure for the amount of appropriations made from the general funds in the Treasury for the purposes of the Act.

(*3*) *The decisions of this Court.*—If, however, by reason of the fact that the proceeds of the processing taxes were

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[87] The Act of May 8, 1792, 1 Stat. 267, pledging and appropriating the proceeds of internal revenue taxes on distilled spirits levied by the Act to the same purposes as those set forth in the Act of March 3, 1791; the Act of March 3, 1797, 1 Stat. 503, appropriating the tariff duties levied by the Act "First, for the payment of the principal of the present foreign debt of the United States: Secondly, for the payment of the principal of the debt now due by the United States to the Bank of the United States"; the Act of May 13, 1800, 2 Stat. 84, appropriating the proceeds of the duties levied to the payment of interest and principal of the debts of the United States; and the Act of March 26, 1804, 2 Stat. 291, providing that the proceeds from the increased tariffs levied by the Act should be covered into a separte fund to be used for the sole purpose of carrying on a war against the Barbary powers.

originally earmarked for particular objects of expenditure and still serve as the measure for the amount of an appropriation for such objects, that tax is to be subject to more rigid constitutional requirements than taxes the proceeds of which are credited to the general funds of the Treasury and used for appropriations made by Congress without reference to source or amount of receipts; and if, despite the holding of this Court in the case of *Frothingham* v. *Mellon,* (1923) 262 U. S. 447, respondents may litigate the question as to whether the tax is valid in view of the fact that its proceeds serve as a yardstick to measure appropriations—then it is submitted that the appropriations under the Agricultural Adjustment Act are for the general welfare and the processing tax is one to provide for the general welfare of the United States. This conclusion should readily follow from the decisions of this Court in the Sugar Bounty Case (pp. 37-40, above) and the Protective Tariff Case (pp. 53-56, above) and from the legislative precedent in the matter of the bounties for the cod fisheries (pp. 57-69, above).

The Sugar Bounty Case, *United States* v. *Realty Company,* (1896) 163 U. S. 427, demonstrates that Congress may impose taxes whose proceeds are to be expended for carrying out an objective other than one falling within the enumerated administrative and regulatory powers of Congress. Payment of moral debts arising from sugar bounty legislation is clearly not one of the enumerated administrative or regulatory powers of Congress. If the clause "to pay the Debts" is not limited to debts incurred in carrying out the enumerated powers, then the clause found immediately thereafter in the same paragraph of the Constitution, to "provide for the common Defence and general Welfare" should be similarly construed.

Protective tariff legislation was sustained in the *Hampton* case as an exercise of the taxing power of Congress despite the additional non-revenue purpose of the taxes levied by the protective paragraphs of the Tariff Acts.

It should follow that the appropriation of proceeds of the processing taxes for the similar purpose of protecting the domestic price level of the agricultural industry would be for an equally valid purpose. In each case, the tax has the primary purpose of producing funds which are covered into the Treasury, and in each case there is the additional purpose (in the one instance through imposition or threat of imposition of the tax, in the other through expenditure of its proceeds) to encourage domestic producers and provide a higher price level for their products domestically consumed. That additional purpose should not prevent a tax which produces substantial revenue that is covered into the Treasury from being a tax to provide for the general welfare when the two purposes are so nearly identical and vary only through the means by which they are accomplished.

Finally, the legislative precedent of the bounty for the Massachusetts cod fisheries (originating with the 1st Congress, debated at length in the 2nd Congress and again enacted by that Congress, and thereafter continued in effect, with but a brief interval, for three-quarters of a century) seems clearly to indicate that an outright bounty, and *a fortiori* contractual payments, for encouragement of an industry such as agriculture, constitutes an appropriation for the general welfare and, therefore, taxes to provide for such payments are taxes to provide for the general welfare.

Thus, in the foregoing precedents there are found three basic principles, namely, that Congress may tax to provide for the general welfare, that the general welfare is not limited to the subject matters of the enumerated administrative and regulatory powers of Congress, and that appropriations to aid domestic industry are appropriations to provide for the general welfare.

Obviously, other decisions of this Court upon the validity of taxes, having regard to their objects of expenditure, involve no holding contrary to the position taken by amicus curiae. There was involved in *Citizens' Savings*

& Loan Association, etc. v. *Topeka,* (1875) 20 Wall. 655, a donation of bonds to a manufacturing company as an inducement to the company to establish its iron works in the city issuing the bonds; in *City of Parkersburg* v. *Brown,* (1883) 106 U. S. 487, the lending of bonds to a manufacturing concern for the purpose of aiding in the erection of a foundry and machine works in the city issuing the bonds; and in *Cole* v. *City of La Grange,* (1885) 113 U. S. 1, the donation of bonds to a manufacturing company to aid it in the establishment of a rolling mill in the city issuing the bonds. These cases, while holding that the particular State legislative Acts involved taxation for a private and not a public purpose, are clearly, by reason of the fact that only a particular concern was directly benefited, not precedents with respect to the question as to whether Federal appropriations expended to benefit the agriculture of the country and, by so doing, all industry and labor, are for the general welfare. In such cases as *Marshall Field & Co.* v. *Clark,* (1892) 143 U. S. 649; *United States* v. *Realty Co.,* (1896) 163 U. S. 427; *Smith* v. *Kansas City Title & Trust Co.,* (1921) 255 U. S. 180; and *Massachusetts* v. *Mellon,* (1923) 262 U. S. 447, this Court did not find it necessary to determine whether the particular Federal statutes there considered involved the use of the Federal power of taxation to provide for the general welfare.

Finally, there are a number of decisions of this Court involving Federal and State pecuniary exactions not strictly taxes but in the nature of taxes in that payment was compulsory and the proceeds were administered and expended by public authorities. In each instance, the proceeds were dedicated to a particular object of expenditure and the impositions and expenditures authorized by the legislation presented in part questions analogous to the question as to what constitutes general welfare.

In the Head Money Case (*Edye* v. *Robertson,* (1884) 112 U. S. 580) the Federal statute imposed a duty upon every foreign passenger coming into a port within the United States, the moneys collected constituting a fund to be ex-

pended under the direction of the Secretary of the Treasury, among other purposes, for the care of immigrants and the relief of such as were in distress. *Dayton-Goose Creek Rwy. Co.* v. *United States,* (1924) 263 U. S. 456, concerned the validity of the "recapture clause" of the Interstate Commerce Act, as amended. Under that Act, carriers were required to pay over their net income in excess of a fair return, as fixed by the Interstate Commerce Commission, one-half to a reserve fund to be maintained by the carrier as trustee and expended only for specified purposes and the other half to a revolving fund to be administered by the Commission in making loans to weaker carriers to meet expenditures on capital account, to refund maturing securities originally issued on capital account, and for buying equipment or facilities and leasing or selling them to carriers. The exactions in both these cases were held valid, not as taxes but as Congressional regulations of interstate and foreign commerce.[38]

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[38] There are also a number of State statutes held valid by this Court and presenting somewhat analogous situations. It was held in *Jones* v. *City of Portland,* (1917) 245 U. S. 217, that the establishment and maintenance by a municipality of a public yard for the sale of wood, coal, and fuel, without financial profit, to the inhabitants of the municipality was a proper exercise of the power of taxation; and in *Green* v. *Frazier,* (1920) 253 U. S. 233, that a State could exercise its power of taxation for the creation of, and furnishing capital for, a State bank in order to loan the funds of the bank, including public funds on deposit, to individuals and organizations; for the creation of, and furnishing capital for, a State agency to engage in the manufacture and marketing of farm products and to establish and maintain a warehouse, elevator, and flour mill system; and for the creation of, and furnishing capital for, a State agency to engage in the business of providing homes for residents of the State.

As to State compulsory pecuniary exactions for bank depositors' guarantee funds (*Noble State Bank* v. *Haskell,* (1911) 219 U. S. 104 and 575; *Shallenberger* v. *First State Bank of Holstein,* (1911) 219 U. S. 114; and *Abie State Bank* v. *Bryan,* (1931) 282 U. S. 765) and for a State workmen's compensation fund (*Mountain Timber Co.* v. *Washington,* (1917) 243 U. S. 219), this Court found such exactions valid despite the limitations of the due process clause of the Fourteenth Amendment. In the latter case, Mr. Justice Pitney stated that, whether the compulsory contribution by employers to the State fund was regarded as a tax or as an imposition, the Court was clearly of the opinion that the State might enact the legislation in the exercise of its power to pass such legislation as reasonably deemed necessary to promote the health, safety, and general welfare of its people.

All the foregoing cases concerning compulsory pecuniary exactions not strictly taxes involved, either admittedly or by implication, in consequence of the limitations of the due process clause, the question whether the purpose to which the proceeds of the compulsory pecuniary exaction were dedicated was sufficiently public in character to constitute a valid exercise of Federal power.

(4) *The question of whether surplus control of agricultural commodities is for the general welfare is not one for which the courts will substitute their judgment for that of Congress.*—It is the position of amicus curiae that whether an appropriation (or a tax to raise the moneys for the expenditures authorized by the appropriation) is for the general welfare is primarily a question for Congress alone to decide and one as to which the courts will not substitute their judgment for the judgment of Congress. Hamilton, in his Report on Manufactures (3 Annals of Congress 1012), had previously said that it was "left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper". Madison himself, when President, in his veto message of March 3, 1817, on the National Bank "Bonus Bill" took a like view ("Veto Messages of the

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In the *Noble State Bank* case, Mr. Justice Holmes drew the distinction between legislation providing public expenditures pursuant to guarantees of bank deposits and legislation such as that involved in *Citizens' Savings & Loan Association, etc.* v. *Topeka,* (1875) 20 Wall. 655, discussed above (page 37). He said—

> "It will serve as a *datum* on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Citizens' L. Asso.* v. *Topeka,* 20 Wall. 655; *Lowell* v. *Boston,* 111 Mass. 454." [P. 112—Italicized as in original]

It will be recalled that in the *Loan Association* case the public credit of the whole community was extended for the benefit of a single manufacturing concern to induce it to establish its plant in the community.

Presidents of the United States", (1886) S. Mis. Doc. 53, 49th Cong., 2nd Sess., p. 17), saying—

> "questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision."

Likewise, President Monroe in a message accompanying his veto message of May 4, 1822, on the Cumberland Road Bill (Richardson's "Messages and Papers of the Presidents", p. 166) stated that—

> "Had the Supreme Court been authorized, or should any other tribunal distinct from the Government be authorized, to impose its veto, and to say * * * that the appropriation to this or that purpose was unconstitutional, the movement might have been suspended and the whole system disorganized. It was impossible to have created a power within the Government or any other power distinct from Congress and the Executive which should control the movement of the Government in this respect and not destroy it. * * * "

Certainly, the foregoing should be the rule if Congress has any facts before it that justify the conclusion that a particular tax or appropriation is for the general welfare. The courts should not substitute their judgment for that of Congress on such a question. As said by this Court in *United States* v. *Realty Co.*, (1896) 163 U. S. 427—

> "In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government. * * *" [P. 444]

If the Congressional determination of whether or not a tax is one to provide for the debts of the United States can rarely, if ever, be a subject of review by the judicial branch of the Government, it is submitted that the Congressional determination of whether or not a tax is one to provide for the general welfare of the United States can rarely, if ever, be a subject of review by the judicial branch of the Government.

If this Court is to review to any extent the question of whether the taxes and appropriations under the Agricultural Adjustment Act provide for the general welfare, its review should be limited to the question as to whether there is any reasonable basis for the Congressional conclusion that the taxes and appropriations do so provide. Congress by its enactment of the legislation has said that in its judgment they do. Moreover, during their consideration of surplus control legislation, the agricultural committees of the two Houses gave attention to the question in their reports upon such legislation. In the report of the House Committee on Agriculture on the earliest of the surplus control measures (H. R. 9033, 68th Cong., 1st Sess.), the committee discussed the question as to whether the appropriations involved were for the general welfare. It outlined in detail in the earlier portion of its report (H. Rept. 631, 68th Cong., 1st Sess., pp. 9-10) the importance of agriculture to the general welfare. Later, it discussed in the report the validity of the legislation under Article I, Section 8, Clause 1, of the Constitution. The committee said—

> "It will probably be generally admitted that an appropriation to aid agriculture is 'for the general welfare,' even without regard to the present emergency. In his final message to Congress President Washington, in recommending the establishment of a national university, stated:
>
> " 'It will not be doubted that with reference either to individual or national welfare agriculture is of primary importance. In proportion as nations advance in population and other circumstances of ma-

turity this truth becomes more apparent and renders the cultivation of the soil more and more an object of public patronage. Institutions for promoting it grow up, supported by the public press; and to what object can it be dedicated with greater propriety? (I Richardson, Messages and Papers of the Presidents, 201.)'

"President Coolidge, in his address before the National Republican Club in New York City, February 12, 1924, stated that agriculture—

" 'is an interest on which it is estimated that more than 40,000,000 of our people are directly or indirectly dependent. It represents an investment several times as large as that of all the railroads of the country. It has an aggregate production of over $8,000,000,000 each year. * * *

" 'You can not long prosper with that great population and great area in distress. * * * This problem is not merely the problem of the agricultural sections of our country. It is the problem likewise of industry, of transportation, of commerce, and of banking.'

"The facts set forth in the earlier part of the report upon the bill establish beyond question the existence and the seriousness of the present emergency. The facts for the most part are beyond dispute. In view of this emergency, it would seem that there can be no doubt that the appropriation authorized is one 'to provide for the general welfare'." [P. 58]

The committee was of the view that if Congress determined that an appropriation is for the general welfare its decision would be entitled to, and would be accorded, great weight by the courts. After referring to the *Realty Company* case and quoting the extract from that case set forth above (page 79), the committee said—

"In Smith *v.* Kansas City Title Co. (1921, 255 U. S. 180, 210), the Federal Farm Loan Act was held constitutional, notwithstanding the contention that the appropriation of money for the capital stock of the Federal land banks and for the use of the Federal Farm Loan Board was beyond the power of Congress. (See

the brief of Hon. Charles Evans Hughes in support of the validity of the appropriation, quoted in part by Corwin, The Spending Power of Congress, 36 Harvard Law Review, 548, 578, 581—notes 83, 84.)

"Although it would not seem necessary in order to support the appropriation in question, there is good authority for the position that the question is a political one and will not be reviewed by the courts. (See Burdick, Federal Aid Legislation, 8 Cornell Law Quarterly 324; Corwin, The Spending Power of Congress, 36 Harvard Law Review 548; Note, 9 Cornell Law Quarterly 50)." [P. 59]

The committee concluded its discussion of general welfare by referring to the principle set forth in the case of *Frothingham* v. *Mellon* and also referring to a number of legislative precedents in which Congress had made appropriations for the purchase of stock in governmental corporations to engage in business, appropriations for agriculture, appropriations to stimulate commerce, and appropriations "for other than Federal governmental purposes, in the strict sense". (Pp. 59-60)

In subsequent reports upon surplus control legislation, committees of Congress again pointed out the national character of the agricultural problem. Thus, the Senate Committee on Agriculture and Forestry said—

"These are cold statistical measurements of the agricultural situation. A far more impressive picture has been placed before your committee repeatedly by men familiar with agriculture in every section of the United States. The facts they have presented leave no doubt of the existence of a grave agricultural problem that concerns not farmers alone, but all who are interested in the preservation of a sound national life in this country.

"Agricultural production is so closely interwoven with the general business structure of the Nation, and plays so large a part in our national economic life, that there is no individual, no matter what his occupation or place, who would not ultimately be affected by continued agricultural depression.

"As the chief source of our food supply, agriculture is a principal factor in maintaining our national security, as well as a major economic necessity. But the farm also looms large as a primary source of supply for industrial raw material, as a purchaser of goods and services furnished by the rest of the population, as a reservoir of future citizenship, and as bearing a large portion of the cost of Government activities.

"The National Industrial Conference Board of New York, an authoritative research organization, recently completed an exhaustive study of the agricultural situation. The following facts, as presented by Virgil Jordan, chief economist of the board, strikingly sum up some measurements of the important place of agriculture in the national economy:

"It normally exerts a purchasing power for nearly $10,000,000,000 worth of goods and services of other groups annually.

"It purchases annually about a tenth of the value of the products of our manufacturing industries.

"It supplies materials upon which depend industries giving employment to nearly half of our industrial workers.

"It pays indirectly about two and half billions in wages of urban workers.

"Its products constitute nearly half of the value of our exports.

"It pays in taxes one-fifth of the total cost of government.

"It is a billion-dollar real-estate business, as measured by the rent paid by the farm tenants.

"The capital invested in it in 1919 more than equalled that invested in our manufacturing industries, mines, and railroads combined.

"It represents about a fifth of our national wealth, and normally contributes about a sixth of the national income.

"Since it supplies not only the food for our industrial workers but about a third of the materials of our industries and a market for a large part of their products, it forms the basis of our industrial prosperity, and changes in the volume of trade tend to follow

changes in the purchasing power of farmers.'"[39] [S. Rept. 1304, 69th Cong., 2nd Sess., pp. 13-14]

The legislative history of the Agricultural Adjustment Act during the 73rd Congress, 1st Session, must be read in close connection with that of the so-called "National Emergency Bill" passed by the House and reported in the Senate but a few weeks before during the 72nd Congress, 2nd Session. That bill provided for a processing tax and obviously served, even in details of language, as a model for the processing tax provisions of the Agricultural Adjustment Act. The National Emergency Bill embodied the fundamental principles of the Agricultural Adjustment Act. Its only pertinent major difference in substance was that its appropriations were available only for bounties upon that portion of the production of agricultural commodities needed for domestic consumption, i. e., the domestic allotment, while the present Act authorizes appropriations not only for that purpose but also for removal of surpluses to foreign or other markets and for rental or benefit payments, through contracts or other voluntary means, for reduction of acreage or of production.

Considering the committee reports upon both the Agricultural Adjustment Act and the National Emergency Bill during the preceding session, there is no difficulty in ascertaining in which respects the agricultural committees of Congress regarded the proposed legislation as legislation providing taxes and as appropriations for the general

[39] For similar statement by the House Committee on Agriculture, see H. Rept. 1790, 69th Cong., 2nd Sess., pp. 15-16. Also; in the first session of the 69th Congress the House committee in discussing the Government's relation to the agricultural problem urged at length the necessity for governmental assistance, referred to such legislative precedents as the numerous appropriations for agricultural colleges, the "billions" spent for the development of arid lands and the building of transcontinental railroads, the "pioneering for general welfare" involved in the merchant marine subsidies, Muscle Shoals legislation, the capital provided for the Federal land bank system, and the expenditures growing out of Federal control of railroads. (H. Rept. 1003, 69th Cong., 1st Sess., pp. 12-15)

welfare. Thus, the House committees found that, by reason of the discriminations against agriculture, with particular reference to those flowing from the tariff situation, the farmer's purchasing power for clothing, lumber, hardware, machinery, and the like was less than half normal; that lack of agricultural purchasing power was responsible directly and indirectly for more than six million of the unemployed; and that the elimination of the price disparity between agriculture and industry would bring about a better balance of national purchasing power, reduce the number of unemployed, aid in reestablishing the purchasing power of labor and other consumers as well as agriculture, and be an effective measure toward meeting the present national emergency. (H. Rept. 1816, 72nd Cong., 2nd Sess.) The committee, on page 1 of its report, stated that the hearings held by it in the 72nd Congress, 2nd Session[40]—

> "emphasize the relation of the present situation of agriculture to the general economic depression and develop, in much fuller detail than can be set forth in this report, the fact that this legislation is not a measure solely for the relief of agriculture but is a bill intended to assist in meeting the present national economic emergency in industry, employment, transportation, and finance as well."

The House committee also reached the conclusion that the charges upon processing would undoubtedly cost the consumer money—

> "but this money will promptly be spent by the farmer in ways which will decrease unemployment and add to the profits of business. * * * The consumer as well as the farmer and the business man has everything to gain from a fair and balanced relationship between our productive forces." [P. 7]

The Senate committee, in its report during the 72nd Congress, 2nd Session, found that the loss of purchasing power

[40] Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Adjustment Program", December 14-20, 1932.

on the part of the farmers had had a most serious effect upon industry in general through the inability of farmers to buy industrial products and, moreover, had deprived the farmer of his ability to meet his indebtedness. (S. Rept. 1251, 72nd Cong., 2nd Sess., p. 2) The committee also referred to the ultmate benefits to the consumer and the business man that would follow from the enactment of the proposed legislation. (P. 4)

In the 73rd Congress, 1st Session, the House Committee again referred to the fact that the additional return to be received by farmers by reason of the operation of the bill would be money promptly spent by the farmer in ways that would decrease unemployment and add to the profits of business and that the increased return would also increase the assets behind our rural banking structure and do more to relieve the banking situation in rural communities than any other type of legislation. The committee also referred to the gains that the consumer and the business man might expect to obtain from a well-balanced relationship between production and consumption that would restore to agricultural commodities their pre-war purchasing power and, in conclusion, stated that the measure was "essential to the relief of the national emergency". (H. Rept. 6, 73rd Cong., 1st Sess.)

It is submitted that the only conclusion to be reached is that Congress was of the view that the legislation was not only in the interests of agriculture but of business and of the consumer—that is, the legislation would provide for the general welfare. The committees referred to the various hearings held within the few months immediately preceding the reporting of the proposed measures, which served as the basis for the committee conclusions. It is impracticable to set forth in this brief any adequate summary of the testimony at these hearings, but an examination of the transcripts thereof—all upon specific legislative proposals of a character substantially the same as the measure finally enacted into law—will show that the conclusions reached

by the committees of Congress were not only reasonable but were supported by the testimony at the hearings.[41] It is to be presumed that the Congress acted upon the basis of those hearings and committee conclusions.

Whatever may be the views of this Court as to the policy or wisdom of the legislation and as to whether legislation of the character enacted was the best means of providing for the general welfare in the emergency that faced the nation, it is submitted that, on the basis of the legislative record before Congress, the conclusions of the committees and of Congress that the legislation would provide for the general welfare were not arbitrary and are not therefore subject to redetermination by this Court.

Furthermore, this Court may take judicial notice of the fact that, whether or not attributable in part to the Agricultural Adjustment Act, the light of events shows that parity prices have been obtained for most agricultural commodities, that prices for most of these commodities are now on an equality with industrial prices, and that there has been a distinct economic improvement not only in agriculture but in business generally.

Amicus curiae rests upon the foregoing arguments its conclusion that, as a matter of law, the taxes and appropriations under the Agricultural Adjustment Act provide for the general welfare. The Government in its brief, however, (pages 179 to 227) has set forth at length the detailed objectives of the Act and economic data for the conclusion that the achievement of these objectives will promote the general welfare. With the position taken in the Government's brief, the accuracy of the facts set forth, and the conclusions drawn therefrom amicus curiae is wholly in accord.

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[41] The hearings in question, all held in the 72nd Cong., 2nd Sess., are: Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Adjustment Program", December 14-20, 1932; Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Agricultural Adjustment Relief Plan", January 25-February 6, 1933; Hearings before the Committee on Finance, U. S. Senate, entitled "Investigation of Economic Problems", February 13-28, 1933, pp. 108 to 162.

(5) *The appropriation and expenditure provisions are not in violation of the Tenth Amendment.*—The power of Congress in question in this litigation is the power of taxation as affected by the appropriations under the Act and the expenditures pursuant thereto by the executive. When the power exerted is solely this power to tax for the general welfare, there can be no validity to the claim by the respondents that the taxing, appropriation, and expenditure provisions constitute a violation of the powers reserved to the States by the Tenth Amendment to the Constitution. These powers are delegated to the Federal Government by the Constitution. The Tenth Amendment reserves to the States, or to the people, only those powers not delegated to the Federal Government by the Constitution. The Federal powers of taxation, appropriation, and expenditure are not so reserved.

However, the contention of respondents seems to be that the exertion of the Federal power in this instance amounts to something more than the levying of taxes and the appropriation and expenditure of moneys of the United States. They urge that, in effect, the exertion of these powers constitutes a regulation of the production of agricultural commodities and, therefore, regulation of a matter reserved to the States by the Tenth Amendment. It is submitted by amicus curiae that no such regulatory power is attempted to be exerted by Congress. The Act establishes no regulatory requirements with respect to production. The Act does not require that acreage or production be reduced or that farmers enter into an agreement with the Secretary of Agriculture to do so. The sole authority of the Secretary of Agriculture in this connection is—

> "To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, *through agreements with producers or by other voluntary methods,* and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, * * *" [Sec. 8(1)—Italics supplied]

The House Committee on Agriculture in its report on the Act (H. Rept. 6, 73rd Cong., 1st Sess., p. 3) emphasized that such reductions in acreage or production are to be arranged for through agreements or other voluntary methods. There is no attempt at compulsion. No producer has to enter into an agreement with the Secretary. No producer has to accept any rental or benefit payment. No producer has to reduce his acreage or production for market unless he desires to do so. He may refrain from accepting any payments offered him by the Federal Government and continue to produce without regard to any Federal crop program under the Act. He may, but only if he chooses, and then only through his own voluntary act, adapt his production and marketing to such a Federal program.

The statement of Mr. Justice Sutherland with reference to the Maternity Act considered in *Massachusetts* v. *Mellon*, (1923) 262 U. S. 447, is wholly pertinent:

> "First. The state of Massachusetts in its own behalf, in effect, complains that the act in question invades the local concerns of the state, and is a usurpation of power; viz., the power of local self-government reserved to the states.
>
> "Probably it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation, *but simply extends an option which the state is free to accept or reject.* * * *
>
> * * * * * * * * * *
>
> "* * * Nor does the statute require the states to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." [Pp. 480-482—Italics supplied]

So here the individual producer is simply extended an option which he is free to accept or reject.

Not only is this voluntary character present in theory, but also it is true in practice. The original crop adjustment programs were entered into after meetings held by

farmers throughout the crop areas concerned. The programs were entered into only if such meetings indicated to the Secretary of Agriculture that a sufficient number of farmers would enter into voluntary contracts with him to assure such cooperation that the crop adjustment program might reasonably be expected to be effective in carrying out the declared policy of the Act. Referenda open to all producers of a particular commodity were held before a crop adjustment program for that commodity was continued for a second year. The results of these referenda are set forth in the following table:

Commodity program	Date of referenda	Contract-signers		Noncontract signers		Total farmers	
		Voting	Favoring continuance	Voting	Favoring continuance	Voting	Favoring continuance
Corn-hogs [a]	Oct. 15, '34	535,690	69.9%	44,026	33.1%	579,716	67.2%
Wheat [b]	May 25, '35	398,277	89.0%	68,443	72.8%	466,720	86.7%
Tobacco [c]	Je., Jy., '35	(*)	(*)	(*)	(*)	377,271	95.6%
Corn-hogs [d]	Oct. 26, '35	745,415	91.3%	195,988	67.6%	941,403	86.4%

* Separate figures not available.

[a] See U. S. Dept. Agr., "Agricultural Adjustment in 1934", (1935) pp. 108-109.

[b] See U. S. Dept. Agr., Agri. Adj. Adm., "Wheat Production Adjustment", No. 20, June 25, 1935. Revised by addition of figures for Indiana.

[c] See U. S. Dept. of Agr., Agri. Adj. Adm. Press Releases 32-36 and 268-36, July 6 and August 16, 1935.

[d] Preliminary tabulation. See U. S. Dept. Agr., Agri. Adj. Adm. Press Release 749-36, Oct. 30, 1935.

The results of the referenda clearly indicate that a substantial number of farmers did not enter into voluntary agreements under the original programs and also that a substantial, although smaller, number are unlikely to enter into voluntary agreements under the continued program. Obviously, such a situation involves no coercion and no regulation. The option "to accept or reject" referred to by Mr. Justice Sutherland exists in actuality.

Further, an agreement or contract is the usual method by which the Federal Government carries out its powers

of expenditure. Most moneys appropriated are expended in fulfillment of contractual obligations entered into on the one hand by the Federal Government and on the other by individual citizens. The enforcement of the contracts under the Agricultural Adjustment Act is by ordinary judicial process. No sovereign right of the States is interfered with and the contracts are subject to the usual contract law of the State. The contracts are merely a necessary and proper method of carrying out the expenditure powers of the Federal Government.

The coercion and the mandatory rules of conduct which were present in *Hammer* v. *Dagenhart,* (1918) 247 U. S. 251, and the *Child Labor Tax Case,* (1922) 259 U. S. 20, and which the individual was not free to accept or reject, are not present in this case. When, as here, only the powers of taxation, appropriation, and expenditure are exercised and there is no attempt to regulate, then there is no invasion of the field reserved to the States by the Tenth Amendment. For example, the powers of the States, within constitutional limits, to regulate production or to exert their own taxing, appropriation, and expenditure powers with respect thereto, or to authorize cooperative associations of producers or to regulate marketing of agricultural commodities within the State, are left untouched by the Federal Act.

Nor does the Act regulate or fix the prices of agricultural commodities. Its effect thereon flows from the exercise of the Federal powers just as the effect of the protective tariff taxes upon prices of domestic commodities domestically consumed flows from the power of the Federal Government to levy protective tariff taxes. Just as the cod fishery bounties referred to above (pp. 57 to 68) and numerous other appropriations of Congress do not regulate or coerce but merely afford the individual or the State an opportunity to accept or reject, so under the Agricultural Adjustment Act there is no regulation but only an offer of benefits which the individual may, of his own volition and in ac-

cordance with his own view as to his best economic interests, voluntarily accept or reject.

In *Ellis* v. *United States*, (1907) 206 U. S. 246, this Court had before it the Act of Congress limiting the hours of daily service of laborers and mechanics employed upon public works of the United States. The limitations were pursuant to the Government's powers of appropriation and expenditure as carried out through contracts between the Government and private contractors. As this Court said—

> "It is true that it [the Congress] has not the general power of legislation possessed by the legislatures of the states, and it may be true that the object of this law is of a kind not subject to its general control • • • however, the fact that Congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes." [P. 256]

Clearly, it would seem that the Congressional power of expenditure may, through contracts and conditions therein, affect matters that the States may regulate and that Congress may not regulate. That fact, however, does not invalidate such an exercise of the power of expenditure. Congress may attain such advantages as it deems for the general welfare, through expenditures pursuant to contracts that are made by the Government with those who voluntarily choose to enter into such contracts.

III

The Processing Tax Provisions Do Not Involve An Unconstitutional Delegation of Legislative Power

1. The contention that the processing tax provisions involve an unconstitutional delegation of legislative power is now immaterial because Congress has expressly ratified the assessment and collection of the taxes.

Amicus curiae has, in the foregoing portions of this brief, urged that the processing taxes are valid notwithstanding

the appropriation and expenditure provisions of the Act. The respondents contend, however, that the tax provisions of the Act are also invalid because of improper delegation of legislative power. (R. 28-29, Pars. 6, 7) It is the position of amicus curiae that, even assuming *arguendo* that such an improper delegation occurred, the contention has become immaterial by reason of the provisions of section 21(b) of the Agricultural Adjustment Act, added thereto by section 30 of the amendatory Act of August 24, 1935. These provisions are, in part, as follows:

> "(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective * * * prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes * * * are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. * * * Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment."

The quoted provisions were enacted by Congress subsequent to the decision of the Circuit Court of Appeals in this case and prior to the grant of the writ of certiorari herein by this Court. According to the statement of the House managers the quoted provisions make the "legalization and ratification effective as if there had been in existence, immediately prior to the occurrence of the particular action ratified and legalized, an act of Congress authorizing such action." (H. Rept. 1757, 74th Cong., 1st Sess., p. 34) The committees cited the decision of this Court in *United States* v. *Heinszen & Co.*, (1907) 206 U. S. 370, as authority for the exercise of such power by Congress. (H. Rept. 1241, 74th Cong., 1st Sess., p. 21; S. Rept. 1011, 74th Cong., 1st Sess., p. 23)

Significant statutory precedents for Congressional ratification of executive action are furnished by section 1 of the Emergency Banking Act of March 9, 1933 (48 Stat. 1), and by section 13 of the Gold Reserve Act of 1934 (48 Stat. 343). The President and the Secretary of the Treasury, during the monetary and banking crisis which existed in the early days of March, 1933, had, under color of section 5(b) of the Trading with the Enemy Act, issued orders and regulations of extensive scope and effect relating to the activities of banks and dealings in gold. There was grave question whether section 5(b) of the Trading with the Enemly Act had expired. Further, an examination of that provision will disclose the striking breadth of the power there conferred and the virtual absence of legislative direction to guide executive action. Under these circumstances, the first section of the first Act of the 73rd Congress provided as follows:

> "Section 1. The actions, regulations, rules, licenses, orders and proclamations heretofore or hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury since March 4, 1933, pursuant to the authority conferred by subdivision (b) of section 5 of the Act of October 6, 1917, as amended, are hereby approved and confirmed."

Sections 43 and 45 of Public No. 10, 73rd Congress, (48 Stat. 51-54) (the so-called "Thomas Amendment") conferred on the President various powers in connection with the monetary system of the country. These included the power to enter into agreements with Federal reserve banks, to conduct open market operations, to issue United States notes, to fix the weight of the gold dollar, to accept silver in payment of foreign debts, and to issue silver certificates. Section 13 of the Gold Reserve Act of 1934 not only "approved, ratified, and confirmed" actions, regulations, etc., taken or issued under those sections but also actions, regulations, etc., taken or issued under the Emergency Banking Act of March 9, 1933. That section reads as follows:

"Sec. 13. All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1933, or under section 43 or section 45 of title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed."

It is certainly reasonable to suppose that such recent and important examples of Congressional ratification of actions of the executive may well have been the models that served as a basis for the legalization and ratification provisions of the amended Agricultural Adjustment Act.

It is submitted that this case is to be decided by this Court in accordance with the law as in effect at the time of the decision by this Court, irrespective of the law at the time the case arose. (Cooley, "Constitutional Limitations", 8th ed. pp. 788-790) In *Rafferty* v. *Smith, Bell, & Co., Ltd.*, (1921) 257 U. S. 226, this Court reversed judgments requiring refunds of certain taxes, on the sole ground that the taxes were validated by a ratifying Act passed after those judgments but prior to the granting of a writ of certiorari by this Court.

The argument has been made, however, that Congress can not ratify that which it could not originally have authorized; that it could not originally have authorized an unconstitutional delegation of legislative power; and that, therefore, it can not ratify the taxes in question. It is the position of amicus curiae that (leaving aside the question of delegation of legislative power) the processing taxes are valid. Congress could have originally authorized the processing taxes. It could, therefore, validate such taxes if, as originally enacted, they were invalid by reason of some defect as to the form in which they were authorized. That this defect is a constitutional defect is immaterial. The legalization and ratification by Congress is not of the unconstitutional delegation of legislative authority but of the assessment and collection of taxes on the processing of certain agricultural

commodities at rates fixed by the Secretary of Agriculture. Whether or not the acts of the Secretary of Agriculture in fixing the particular rates of tax were valid and whether or not the acts of the Secretary of the Treasury and his subordinates in assessing and collecting the taxes at those rates were valid, when originally taken, is immaterial, for it is those acts that are now legalized and ratified.

Congress may legalize and ratify taxes, illegal when assessed and collected but assesed and collected under color of authority, if it could have imposed such taxes in the first instance and if at the time of legalization and ratification it still had the power to impose such taxes. (*United States* v. *Heinszen & Co.*, (1907) 206 U. S. 370; *Rafferty* v. *Smith, Bell, & Co., Ltd.*, (1921) 257 U. S. 226; *Hamilton* v. *Dillin*, (1875) 21 Wall. 73; *Mattingly* v. *District of Columbia*, (1878) 97 U. S. 687; *Tiaco* v. *Forbes*, (1913) 228 U. S. 549; *Charlotte Harbor & Northern Rwy.* v. *Wells*, (1922) 260 U. S. 8; *Hodges* v. *Snyder*, (1923) 261 U. S. 600; *Mascot Oil Co.* v. *United States*, (1931) 282 U. S. 434; *Boardman v. Beckwith*, (1865) 18 Iowa 292)

Taxes on the processing of cotton, at the rate of 4.2 cents per pound, were assessed and collected by the Secretary of the Treasury under color of authority. Congress could have, by express legislative provision, imposed such a tax in the first instance. Congress may, therefore, under the decisions cited, legalize and ratify a tax assessed and collected at such rate. By so doing it does not legalize or ratify its own action in unconstitutionally delegating legislative authority but legalizes and ratifies the actions of other Government officers, namely, the Secretary of the Treasury and the Secretary of Agriculture. The case of *Read* v. *City of Plattsmouth*, (1883) 107 U. S. 568, is in point. In that case the legislature of Nebraska ratified and validated certain bonds issued by the City of Plattsmouth and also ratified and validated taxes which had been imposed by the city to pay for the bonds. It was objected that the rati-

fication was not good on the ground that it violated the State constitutional provision forbidding the granting of corporate power by special Act of the legislature. This Court held that this objection was not well taken for the reason that corporate power was not granted by this ratification. The ratification did not give the city power to issue the bonds and levy the taxes but simply operated on the bonds and taxes themselves directly. This Court said—

> "Here the power of the legislative department of the State is directly exercised upon the transaction itself, and upon a matter clearly within the scope of its authority. * * *" [P. 576]

The fact that the original defect assumed for purposes of this argument flows from an unconstitutional delegation of legislative power does not prevent the exercise by a legislature of its power of legalization and ratification. As above stated, the legalization and ratification is not of the unconstitutional delegation of power but of the acts of the administrative officers taken under color of the delegated authority. While no decisions of this Court involving the precise situation have been found,[41a] recent decisions of the New York Court of Appeals do involve this situation.

[41a] A somewhat analogous situation was presented in *Burnet* v. *Aluminum Goods Mfg. Co.*, (1932) 287 U. S. 544. The Revenue Act of 1917 did not provide for consolidated returns by corporations. Nevertheless, regulations were issued under the Act by the Treasury Department (Regulations 41, Article 77) authorizing such returns. These consolidated return regulations were validated by section 1331 of the Revenue Act of 1921 (42 Stat. 227, 319) which provided that for the purpose of determining excess profits taxes the Revenue Act of 1917 "shall be construed to impose the taxes therein mentioned upon the consolidated returns of net income and invested capital in the case of domestic corporations and domestic partnerships that were affiliated during the calendar year 1917." In the case above cited this Court apparently assumed the validity of section 1331 and regarded the regulations in question as having been ratified or validated. In *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner*, (1930) 43 F. (2d) 782 (C. C. A. 4th), section 1331 was specifically held constitutional.

The New York State emergency banking law (Laws of New York, 1933, c. 41, sec. 2) authorized the banking board to suspend any provision of the banking law in whole or in part and—

> "to adopt, rescind, alter and amend rules and regulations inconsistent with and in contravention of any law: (1) To safeguard the interests of depositors and stockholders in corporations and depositors with persons subject to the supervision of the banking department; (2) To prescribe and regulate methods of conducting business by such persons or corporation; (3) To prescribe what is for such persons and corporations a safe or unsafe condition for transacting business"

The legislature further provided, in section 3, that any "rule, or regulation of the banking board adopted or made pursuant to the * * * act shall supersede any provision of law inconsistent therewith". In *Moses* v. *Guaranteed Mortgage Company of New York*, (1934) 239 App. Div. 703, the Appellate Division held invalid, as an unconstitutional delegation of legislative power, the provisions of the Act of 1933 on which the banking board relied for authority to make the rules and regulations involved in the case. An appeal was taken from the decision of the Appellate Division to the Court of Appeals. However, prior to the decision of the Court of Appeals, the New York State legislature passed chapter 11 of the Laws of New York, 1934, which made more definite the authority devolved upon the banking board (section 2) and in section 4 provided—

> "All actions and/or omissions, prior to the passage of this act, taken or omitted to be taken in accordance with the suspensions, resolutions, rules and regulations of the banking board [superintendent of insurance] pursuant to the provisions of the chapter [i.e., the 1933 Act] amended by this act are hereby approved and confirmed, but only to the extent that such actions and/or

omissions have been in accordance with such suspensions, resolutions, rules and regulations.''

On appeal, the Court of Appeals reversed the judgment of the Appellate Division. (*Moses* v. *Guaranteed Mortgage Company of New York,* (1934) 264 N. Y. 476) The Court of Appeals rendered a per curiam opinion resting its decision on the authority of *Matter of People* (*Title & Mortgage Guarantee Company of Buffalo*), (1934) 264 N. Y. 69, decided by the court the same day.

The case referred to by the Court of Appeals in the per curiam opinion involved a proceeding by the State superintendent of insurance under Laws of New York, 1933, chapter 40, granting him a broad power to make rules and regulations which should supersede existing law inconsistent therewith—a power similar in its breadth to the one held invalid in the case of the banking board. The State legislature, however, had amended the 1933 insurance law so as to make more definite the authority devolved upon the superintendent of insurance and in section 6 of the amendatory Act (Laws of New York, 1934, c. 10) enacted ratifying provisions identical with those above quoted in the case of the banking board, except that the words ''superintendent of insurance'' were substituted for ''banking board''. Thereafter, the Court of Appeals, in the case referred to, sustained the validity of action taken pursuant to the authority granted the superintendent of insurance in the 1933 Act and stated that the 1934 amendments were such ''as to remove possible attack on such ground'', i. e., on the ground of improper delegation of legislative power.

The decisions of the Court of Appeals of New York State in the two cases seem authority for the following propositions: First, acts of administrative officers pursuant to color of authority of an Act involving an unconstitutional delegation of legislative power may be ratified by the legislature; second, such ratification is valid even if it occurs after the decision of a lower court holding the original stat-

ute invalid as an unconstitutional delegation of legislative power and the acts thereunder illegal, but prior to decision by a higher court on appeal; and, third, the case is to be decided in accordance with the law in force at the time of the appeal.

Furthermore, even though the legalizing and ratifying Act here in question were construed as a retroactive imposition of a tax on the processing of cotton at the rate of 4.2 cents per pound it would still be valid. A tax is not necessarily invalid because retroactively applied. (*Stockdale* v. *Atlantic Insurance Company of New Orleans,* (1874) 20 Wall. 323; *Billings* v. *United States,* (1914) 232 U. S. 261; *Brushaber* v. *Union Pacific R. R. Co.,* (1916) 240 U. S. 1; *Lynch* v. *Hornby,* (1918) 247 U. S. 339; *Hecht* v. *Malley,* (1924) 265 U. S. 144; *Milliken* v. *United States,* (1931) 283 U. S. 15) This is particularly true where the retroactive tax does not impose, as was said by this Court in *Lewellyn* v. *Frick,* (1925) 268 U. S. 238, 252, "an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways". The respondents conducted their business of manufacturing cotton knowing that a processing tax was imposed and being assessed and collected at least under color of authority of an Act of Congress.

The limitation upon delegation of authority to administrative officers is that Congress may not abdicate the essential legislative functions with which it is vested and permit others to determine matters of policy which it should itself determine. (*Panama Refining Co.* v. *Ryan,* (1935) 293 U. S. 388) The administrative officer may not be granted power to exercise unfettered discretion to make whatever laws he thinks may be needed. (*Schechter Poultry Corp.* v. *United States,* (1935) 295 U. S. 495) But where by legalization and ratification Congress adopts those acts as its own there is no abdication of essential legislative functions. By the legalizing and ratifying Act Congress resumes the exercise of its essential legislative

functions and no longer abdicates them. It exercises a curative authority that every legislature must possess if the functions of Government are not to be defeated through technical imperfections that occur from time to time in legislative action.

Up to September 30, 1935, the total tax proceeds pursuant to the provisions of the original Agricultural Adjustment Act amounted to $993,825,150.03. (See page 19, above) The amounts heretofore distributed as rental and benefit payments and the outstanding future commitments to make such payments, for the fiscal years 1934 to 1938, inclusive, totalled as of September 13, 1935, $1,376,017,274.[42] These tax proceeds have already been expended to reimburse the general funds of the Treasury for advances for rental and benefit payments. Additional tax collections will be necessary to meet the existing commitments for distribution of rental and benefit payments. The loss of the processing taxes as a source of receipts, through failure to recognize in Congress a power to legalize and ratify action taken under the law originally imposing those taxes, would mean a burden upon the Treasury to the extent that the taxes collected are refunded and to the extent that taxes due remain uncollected. The obligation of obtaining revenue for the refunds and for the existing commitments for distribution of rental and benefit payments not yet met, constitute moral obligations which Congress should meet and, under *United States* v. *Realty Co.*, (1896) 163 U. S. 427, would have power to meet. Such obligations could only be met by providing additional sources of revenue. The power of legalization and ratification by a legislature prevents the occurrence of such a situation and avoids the imposition of new tax burdens.

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[42] Publication of the Budget Section, Finance Division, Agricultural Adjustment Administration, entitled "Estimated Distribution of Rental and Benefit Payments by Months (Fiscal Years 1935 and 1936)", issued September 13, 1935.

2. Irrespective of the legalization and ratification provisions, there is no unlawful delegation of legislative power to determine the rate of tax or the time when the tax becomes effective or terminates.

For the purposes of the foregoing argument with respect to the provisions for the legalization and ratification of the processing taxes, it was assumed *arguendo* that the processing tax provisions involved an unlawful delegation of legislative power. The position of amicus curiae is that, on the contrary, the provisions involve no such delegation.

Congress gave extensive consideration to the question of delegation of legislative power with respect to the financing provisions of the various surplus control bills. This is quite evident in the committee reports with regard to those surplus control measures that provided for the equalization fee, the forerunner of the present processing tax.[43] With respect to the Agricultural Adjustment Act itself Congress obviously had in mind the decision of this Court in the Flexible Tariff Case (*J. W. Hampton, Jr. & Co.* v. *United States,* (1928) 276 U. S. 394) when the House Committee on Agriculture in its report stated that "In their legal aspects these flexible tax provisions are similar to the provisions of the tariff act of 1930 providing for the flexible tariff". (H. Rept. 6, 73rd Cong., 1st Sess., p. 5)

(a) Rate of tax.

Section 9 of the Agricultural Adjustment Act provides as follows:

> "(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; * * *

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[43] See H. Rept. 631, 68th Cong., 1st Sess., pp. 89-92; H. Rept. 1790, 69th Cong., 2nd Sess., pp. 28-29; H. Rept. 1141, 70th Cong., 1st Sess., p. 37; H. Rept. 1273, 70th Cong., 1st Sess., p. 37; S. Rept. 1304, 69th Cong., 2nd Sess., pp. 28-30; S. Rept. 500, 70th Cong., 1st Sess., p. 21.

> "(c) * * * the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2 [i.e., in case of cotton, the pre-war period, August 1909-July 1914]; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

The available statistics referred to were well known to Congress. Thus, the House Committee on Agriculture in its report on the National Emergency Bill, the immediate forerunner of the Agricultural Adjustment Act and the bill from which the processing tax provisions were taken, stated—

> "The pre-war purchasing power or fair exchange value of the commodity will be determined and proclaimed by the Secretary of Agriculture in accordance with index figures which he now maintains and publishes from time to time." [H. Rept. 1816, 72nd Cong., 2nd Sess., p. 5]

and the same committee in its report upon the Agricultural Adjustment Act stated that—

> "If the basic agricultural commodities were now at price levels which would give them at farm prices, a value equivalent to their pre-war purchasing power, the prices therefor would be approximately as set out in the following tables:" [H. Rept. 6, 73rd Cong., 1st Sess., p. 2]

The committee then set forth tables showing the average price of farm products received by producers on February 15, 1933, and the "parity price" (the popular name for the fair exchange value) for the same products as of the same date, computed on the basis of the index figures. (H. Rept. 6, 73rd Cong., 1st Sess., p. 2) Again, for instance, in the

hearings upon the National Emergency Bill before both the House and Senate committees there were set forth the index figures as to prices paid by the farmers for the commodities bought by them and the current average farm price for wheat, hogs, cotton, rice, tobacco, butter fat, and peanuts produced by them, and the "ratio price" (another popular name for the fair exchange value) for the same commodities."

Since January, 1908, the Department of Agriculture has collected at monthly intervals the current average farm price of various farm commodities, including cotton, and published them monthly since March, 1908 (R., Addendum 16); and the Department of Agriculture has also collected information on the prices of articles farmers buy for the period since 1909 and, since August, 1928, has published at quarterly intervals an index of prices based on this information (R., Addendum 18). These statistics have been collected and compiled according to a regularly established and unvarying procedure. This work is now done by the Bureau of Agricultural Economics of the Department. There is no possibility of confusion as to the statistics referred to by Congress for they are the official statistics used by the Department in its various activities. The statistics and the method of their collection and compilation did not originate with the Agricultural Adjustment Act but were in effect long prior thereto and are collected and compiled wholly independently of that Act. (R., Addendum 16-20) The record in this case shows that the statistics were collected and compiled in accordance with the established practice. (R., 11-12, Pars. 9, 12) The care with which the statistics are actually gathered and compiled is well set forth in the testimony of Nils Olsen, Chief of the

"Hearings before the Committee on Agriculture, House of Representatives, 72nd Cong., 2nd Sess., entitled "Agricultural Adjustment Program", December 14-20, 1932, pp. 27-29; Hearings before the Committee on Agriculture and Forestry, U. S. Senate, 72nd Cong., 2nd Sess., January 25-February 6, 1933, entitled "Agricultural Adjustment Relief Plan", pp. 101-106.

Bureau of Agricultural Economics, Department of Agriculture, in the addendum to the record in this case, pages 16-20.

In the provisions of section 9(b) and (c), quoted above, Congress required only a simple mathematical computation for ascertaining the fair exchange value of a commodity such as cotton. The processing tax rate becomes a mere matter of subtraction of the current average farm price for the commodity from the figure for its fair exchange value. There is no contention that the processing tax rate for cotton was not in accordance with the Act, and an allegation to the effect that it was not was stricken from the receivers' report upon the receivers' own motion. (R. 8-9)

The computation of the fair exchange value for cotton, for instance, is made as follows: The current average farm price for cotton during the period August, 1909-July, 1914, is multiplied by the current index of the prices farmers pay for commodities bought by them. Thus, as stated by the Secretary of Agriculture in testifying before the Senate Committee on Agriculture and Forestry—

> "The price of things which farmers are buying today costs them about 104 percent of that basic period. [i. e., 1909 to 1914] The price of wheat in the basic period was, we will say, 90 cents; 104 percent of 90 cents would be, roughly, 94 cents. That is the way in which we ascertain it [i. e., the fair exchange value]."[48]

The processing tax rate is therefore the difference between the two figures, fair exchange value and current average farm price; and these figures are obtained not through estimates or predictions but through careful ascertainment of past facts in accordance with a regularly established and unvarying procedure. The past facts are capable of accurate ascertainment far more so, for instance,

[48] Hearings before the Committee on Agriculture and Forestry, U. S. Senate, 73rd Cong., 1st Sess., March 17-28, 1933, entitled "Agricultural Emergency Act to Increase Farm Purchasing Power", p. 25.

than such factors as "market value" and "cost of production" which are necessary to the computation of many income taxes and tariff rates under existing law. Such factors as cost of production are admittedly incapable of precise ascertainment. (*Hampton, Jr., & Co.* v. *United States*, (1927) 14 Ct. Cust. Appls. 350)

Adjustments in the tax rate.—Section 9(a) of the Act provides that the rate for processing taxes shall be determined by the Secretary of Agriculture as of the date the tax first takes effect and that the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him in conformity with the formula laid down in section 9(b) and (c). This adjustment would take account of any change in the farm price of cotton and in the price paid by farmers for articles bought by them. Section 9(b) also directs that, if the Secretary has reason to believe that the tax at the rate computed in accordance with the formula will cause such reduction in the quantity of the commodity or products thereof domestically produced as to result in the accumulation of surplus stocks thereof or in the depression of farm price of the commodity, then he shall, if after investigation and hearing he finds such result will occur, reduce the rate to such rate as will prevent the accumulation of surplus stocks and depression of the farm price of the commodity.

The Secretary of Agriculture has not, under either of the foregoing provisions, taken any action to adjust the rate of the processing tax on cotton. The question of the validity of these provisions is not here strictly involved. The provisions for determining the rate of tax are wholly separable from the remaining provisions of the Act and without them the Act would be effective to accomplish the Congressional objectives, as is demonstrated by the failure to date to act under them. Furthermore, the taxes involved in the present case would not be affected by any such adjustment if hereafter made by the Secretary of Agriculture

and, in the case of an adjustment hereafter made under section 9(b) to prevent accumulation of surplus stocks or depression of the farm price, the adjustment would have to be made in accordance with the new provisions of that section as amended which have now superseded the provisions of the original section. (See section 12 of the amendatory Act of August 24, 1935)

In any event, however, it is submitted that these provisions for the adjustment of the processing tax rate are fully within the decisions of this Court in *J. W. Hampton, Jr. & Co.* v. *United States*, (1928) 276 U. S. 394, and *Marshall Field & Co.* v. *Clark*, (1892) 143 U. S. 649, in which cases far broader delegations of power, in fact, than those involved here were sustained by this Court in connection with tax rates.

(b) THE TIME THE TAX BECOMES EFFECTIVE.

(1) *The marketing year.*—Section 9(a) provides that processing taxes shall be in effect with respect to the commodity from the beginning of the marketing year and that—

> "The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture."

This provision merely requires the ascertainment of a well-known trade fact. The marketing year for cotton commences August 1st and the date is widely accepted. (R. 11, Par. 11; R., Addendum 21-22) The date is also recognized by Congress in the cotton statistics Act of March 3, 1927. (44 Stat. 1372)

(2) *The determination that rental or benefit payments are to be made.*—The particular marketing year on which a processing tax is to commence with respect to a basic agricultural commodity is the marketing year next following the date of the proclamation by the Secretary of Agriculture of his determination "that rental or benefit payments

are to be made'' with respect to such basic agricultural commodity. (Sec. 9(a))

The processing tax thus takes effect automatically upon the beginning of the marketing year next following a readily ascertainable fact, namely, the issuance of the proclamation of a prescribed character by the Secretary of Agriculture.

The reason for tying up the imposition of taxes with the making of expenditures for rental or benefit payments is obvious. The intent of Congress that the agricultural adjustment programs should be self-financing and should not be the cause of an unbalanced budget has been explained in the foregoing pages of this brief. (See pages 10 and 11) Congress was in this position: If no expenditures were to be made by way of rental or benefit payments to cotton farmers, for instance, then no taxes were necessary to produce revenue to meet these expenditures. If such expenditures were made, however, then the budget would be unbalanced and the general funds of the Treasury would be called upon to meet the expenditures unless in conjunction therewith adequate taxes came into operation. The Secretary of Agriculture was, in effect, prohibited from spending unless at the same time his program with respect to the particular commodity recognized that processing taxes would automatically come into effect upon the processing of that commodity. The tying together of the expenditure and tax provisions is therefore a limitation upon the Secretary's discretion in making expenditures. Expenditures and taxes should, in the judgment of Congress as evidenced in the Act, be required to go hand in hand. The coming into effect of the processing taxes was therefore made automatically dependent upon the coming into effect of the expenditures for rental and benefit payments.

In the view of the Circuit Court of Appeals, however, this inter-relation of expenditure and taxation constituted an invalid delegation of legislative power. The argument seems to be that, while the imposition of the taxes upon the

processing of a commodity depended automatically upon the making of expenditures with respect to that commodity, the discretion to make the expenditure was not adequately limited by Congress and was an invalid delegation of power. Therefore, the power of taxation being dependent upon an invalid delegation of legislative power to make expenditures, the taxation provisions are in consequence invalid.

This argument fails to recognize that the discretion resting in an executive officer to determine the amount, time, method, and objects of an expenditure to be made by the executive within the limits of the total amount of the appropriation and the time, method, and objects thereof as presented in the appropriation law is not a legislative, but an executive, power. The exercise of such discretion, therefore, does not constitute a delegation of power, much less an unconstitutional delegation of legislative power.

The history of the legislative power of appropriation demonstrates the executive character of the function of expenditure. In *State* v. *Moore,* (1896) 50 Neb. 88, this history is summarized—

> "The origin of legislative appropriations is so well known that it seems almost a work of supererogation to here allude to it. Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees the power of the crown to levy taxes was restrained and abolished, but it was found that, so long as the crown might at its own discretion disburse the revenue, the reservation to the people through parliament of the power to raise revenues was not a complete safeguard. Efforts to control the crown in disbursement as well as in the collection of revenues culminated with the revolution in 1688, and since then the crown may only disburse moneys in pursuance of appropriations made by act of parliament. * * * When our governments, state and federal, came to be established, the requirement of legislative appropriations was adopted from England, * * *"
> [Pp. 94-96]

The Constitution provides (Art. I, Sec. 9, Clause 7) that—

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; * * *"

The constitutional provision limits the executive function of expenditure by the prerequisite of Congressional action through an appropriation, including by implication such limitations as Congress may choose to place upon the appropriation as regards amount, method, objects, and time of expenditure.[46]

> "An appropriation is *per se* nothing more than the legislative authorization prescribed by the Constitution that money may be paid out at the Treasury. * * *" [*Campagna* v. *United States,* (1891) 26 C. Cls. 316, 317]

The constitutional provision limits the executive discretion with respect to expenditures as exercised by the President through those officers who have duties with respect to the custody and disbursement of the public moneys. (See page 30, above)

The fact that the Constitution vests in the Congress the duty of restricting the right of expenditure to expenditures made pursuant to an appropriation does not make the power of expenditure a legislative power. Within the limits of the appropriation as to amount, method, objects, and time of expenditure, the executive function of expenditure remains uncontrolled.

And there must necessarily be discretion in the executive with regard to expenditures if the Government is adequately to function. It is impracticable for Congress to prescribe in minute detail the time when a particular expenditure is

[46] Of course, irrespective of the action of Congress, no appropriation for raising and supporting armies is available for expenditure for a period of more than two years after the date of the appropriation. (Constitution, Art. I, Sec. 8, Clause 12)

to be made and the method to be employed in making the expenditure and the detailed items of the object of expenditure. The object, the method, and the time must be expressed in general terms. The constitutional requirement of appropriation is a check to be exercised by Congress in such detail as it deems necessary to prevent an otherwise uncontrolled executive power of expenditure once revenue has been provided. Supervision over the executive in his observance of such limitations on expenditure as are imposed by Congress through its appropriating function are limited by Congress to the functions vested by Act of Congress in the Comptroller General of the United States and by the rules of the respective Houses to those several committees that have jurisdiction over expenditures in the executive departments. These are the safeguards set up by Congress and they in no wise restrict the discretion of the executive within the limits of the terms of the appropriation.

Further, the discretion in the executive to make expenditures is not a private right as to the exercise of which the respondents may complain and as to which the judicial powers of courts of the United States extend under Article III of the Constitution. The executive discretion as to expenditures involves a matter of public right which Congress may or may not see fit to present in such form that the judicial power is capable of acting on it. Thus, in *Murray* v. *The Hoboken Land & Improvement Co.*, (1856) 18 How. 272, Mr. Justice Curtis said—

> "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. * * *" [P. 284]

Congress has not seen fit to present public rights with regard to executive discretion in making expenditures, in

such form that the courts may take cognizance of them.

The question then arises—are taxing provisions invalid as a delegation of legislative power if the imposition of the tax is made to depend automatically upon the exercise of the executive function of expenditure? The time of imposition of a particular tax rate has heretofore been made to depend upon the exercise of executive functions. Thus, under section 3 of the Tariff Act of 1890, held valid by this Court in *Marshall Field & Co.* v. *Clark,* (1892) 143 U. S. 649, the time of imposition of a particular rate of tax depended on the President's being satisfied that the government of any country producing and exporting sugars, etc., was imposing duties or other exactions upon agricultural or other products of the United States which "he may deem to be reciprocally unequal and unreasonable". Upon the issuance by the President of a proclamation to that effect, the new tax came into operation. This Court said that the law implied that the President would examine the commercial regulations of other countries producing and exporting sugar and form a judgment as to whether they were reciprocally equal and reasonable or the contrary in their effect upon American products. This function of ascertaining the facts and forming a judgment clearly is not a legislative function. It is an executive function when performed by an executive officer. And in section 315 of the Tariff Act of 1922, held valid by this Court in *J. W. Hampton, Jr. & Co.* v. *United States,* (1928) 276 U. S. 394, the time of imposition of the flexible tariff duties depended on executive action. The Tariff Commission was required to make certain investigations, and thereafter the President fixed and established the new rate "whenever the President upon investigation" ascertained the existence of certain differences in costs of production not equalized by existing tariff duties. It was only when these two executive acts had been performed that the time for the imposition of the new duty arrived. As this Court said—

> "There was no specific provision by which action by the President might be invoked under this act, but it was presumed that the President would through this body of advisors keep himself advised of the necessity for investigation or change and then would proceed to pursue his duties under the act and reach such conclusion as he might find justified by the investigation, and proclaim the same if necessary." [P. 405]

No rule or standard at all was laid down as a guide when to exercise these preliminary executive functions under the two Tariff Acts. This was left to the discretion of the President in assisting Congress to carry out the policy of the Tariff Acts.

So, under the Agricultural Adjustment Act, it must be presumed that the Secretary of Agriculture will exercise his executive function of expenditure, within the limitations of the appropriation, as and when he is of the opinion that expenditures for rental and benefit payments are necessary in order to effectuate the declared policy of the Act. It is submitted that if new tariff duties can come into effect by reason of the exercise of an executive function which Congress may invoke, then processing taxes may come into effect upon the exercise of the executive function of expenditure which Congress has invoked.

As was said by this Court further in the *Hampton* case—

> "This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." [P. 406]

Congress has in the Agricultural Adjustment Act invoked the assistance of the executive in part through the

use of its function of expenditure. It invokes that assistance in order to carry out the policy of the Act. It also invokes that assistance in order to specify the time when the processing taxes shall become operative. This involves no delegation of legislative power. The processing tax is effective automatically with respect to a particular commodity whenever the Secretary of Agriculture has exercised his executive function of proclaiming that he will make expenditures for rental and benefit payments with respect to that commodity. The considerations which lead the Secretary to exercise that executive function within the limits prescribed by the Act are considerations unrelated to taxation. Even though the Act provided for no taxes or the taxes under the Act were invalid, he would continue to exercise the executive function of expenditure and make expenditures within the limit of funds made available to him.

The State statute considered by this Court in *Michigan Central R. R. Co.* v. *Powers,* (1906) 201 U. S. 245, provided that the rate of taxation on railroad property should be the average rate of taxation on all other property subject to ad valorem taxes, to be ascertained by dividing the total tax levy on all such property by the value of the property. The average rate of taxation on all other property subject to ad valorem taxes depended, in part, upon the exercise of the discretion of local assessors in making local property assessments and, in part, upon the mathematical computation of the average by the State board of assessors. This Court held the statute valid and, in discussing the objection raised of delegation of legislative functions, it said—

> "It may be laid down as a general proposition that where a legislature enacts a specific rule for fixing a rate of taxation, *by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate,* there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate." [P. 297—Italics supplied]

If the rate of taxation may be made to depend upon executive action taken by assessment officers of the State in another connection, it is submitted that the time when a rate of taxation becomes effective may likewise depend upon executive action. And in the *Michigan Central* case this Court also said—

> "It is true there is a possibility that some local board may be actuated by other than a sense of duty to the community for which it is acting, and have a thought of the ultimate effect [of its assessments] upon the railroad rate. There is always a possibility of misconduct on the part of officials, but legislation would be seriously hindered if it may not proceed upon the assumption of a proper discharge of their duties by the various officials. * * *" [P. 295]

It is true that the policy declared in the Act is one of the limitations imposed by Congress upon the expenditure by the Secretary of Agriculture, in the form of rental or benefit payments, of the funds appropriated by the Act. But the precision of that rule is immaterial. There is no question of delegation of legislative power but only a question of the extent to which Congress chooses to impose limitations upon the executive power of an executive officer to expend moneys appropriated. That matter is one for Congress alone to decide and, having decided it, the discretion remaining in the Secretary of Agriculture is an executive function for him to exercise as he deems appropriate in effectuating the Congressional policy. No question is raised here that the Secretary, in the exercise of his discretion, has not made his expenditures in such manner as to carry out that policy. Having acted within the limits imposed by Congress upon the expenditure of the funds appropriated, whether or not those limitations be precise or indefinite, the Secretary has performed the duty as to which Congress invoked his assistance.

(c) THE TIME THE TAX TERMINATES.

Section 9(a) of the Act provides that—

> "The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: * * * ".

The considerations governing the constitutional validity of this provision are similar to those involved in the constitutional validity of the provisions relating to the time the processing tax takes effect. Further discussion is not necessary here, except to point out that the question is not strictly before this Court inasmuch as no action has been taken by the Secretary of Agriculture with respect to the termination of the processing tax upon cotton. Furthermore, the determination of the Secretary to cease the expenditure of funds for a particular purpose would in no wise injure the respondents and they should not be heard to complain of this prospective exercise of executive discretion.

CONCLUSION

It is submitted that the legislation providing for the processing taxes imposed upon the respondents constitutes a valid exercise of the authority placed in Congress by the Constitution. The taxes are valid excises, uniform, and not in violation of the Fifth Amendment, considered separately from the use made of their proceeds. The taxes, as such, being valid, respondents have no right to question their validity from the standpoint of the use made of their proceeds. However, the expenditure provisions of the Act are for the general welfare and, therefore, the taxes are levied for the general welfare. The Act involves no improper delegation of legislative power and even if there had been

that constitutional defect has been corrected by the legalization and ratification of the taxes assessed and collected by the Treasury officers. Neither the imposition of the tax nor the use made of its proceeds violates the Tenth Amendment.

WHEREFORE it is urged that the decision below should be reversed.

Respectfully submitted,

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November, 1935.

APPENDIX I

Text of Statutes Involved

A. Agricultural Adjustment Act,[1] *c. 25, 48 Stat. 31:*

AN ACT

To relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—AGRICULTURAL ADJUSTMENT

DECLARATION OF EMERGENCY

That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act.

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[1] Section 8(a) of the National Industrial Recovery Act, c. 90, 48 Stat. 195, provided that Title I of the Act of May 12, 1933, might "for all purposes" be thereafter referred to as the "Agricultural Adjustment Act".

From time to time certain of the sections set out herein have been amended. The amendments deemed material to a consideration of this case are indicated herein by footnotes.

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919-July 1929.

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909-July 1914.

* * * * * * * *

PART 2—COMMODITY BENEFITS

GENERAL POWERS

SEC. 8. In order to effectuate[2] the declared policy, the Secretary of Agriculture shall have power—

(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers

[2] Error in enrolling of original.

or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments.

* * * * * * * *

PROCESSING TAX

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided,* That upon any article upon which a manufacturers' sales tax is levied under the au-

thority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that such result will occur, then the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. In computing the current average farm price in the case of wheat, premiums paid producers for protein content shall not be taken into account.

(c) For the purposes of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture.

(d) As used in part 2 of this title—

(1) In case of wheat, rice, and corn, the term "processing" means the milling or other processing (except cleaning and drying) of wheat, rice, or corn for market,

including custom milling for toll as well as commercial milling, but shall not include the grinding or cracking thereof not in the form of flour for feed purposes only.

(2) In case of cotton, the term "processing" means the spinning, manufacturing, or other processing (except ginning) of cotton; and the term "cotton" shall not include cotton linters.

(3) In case of tobacco, the term "processing" means the manufacturing or other processing (except drying or converting into insecticides and fertilizers) of tobacco.

(4) In case of hogs, the term "processing" means the slaughter of hogs for market.

(5) In the case of any other commodity, the term "processing" means any manufacturing or other processing involving a change in the form of the commodity or its preparation for market, as defined by regulations of the Secretary of Agriculture; and in prescribing such regulations the Secretary shall give due weight to the customs of the industry.

(e) When any processing tax, or increase or decrease therein, takes effect in respect of a commodity the Secretary of Agriculture, in order to prevent pyramiding of the processing tax and profiteering in the sale of the products derived from the commodity, shall make public such information as he deems necessary regarding (1) the relationship between the processing tax and the price paid to producers of the commodity, (2) the effect of the processing tax upon prices to consumers of products of the commodity, (3) the relationship, in previous periods, between prices paid to the producers of the commodity and prices to consumers of the products thereof, and (4) the situation in foreign countries relating to prices paid to producers of the commodity and prices to consumers of the products thereof.

MISCELLANEOUS

SEC. 10. * * *

* * * * * * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(d) The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

(e) The action of any officer, employee, or agent in determining the amount of and in making any rental or benefit payment shall not be subject to review by any officer of the Government other than the Secretary of Agriculture or Secretary of the Treasury.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam.

* * * * * * * *

COMMODITIES

SEC. 11.[3] As used in this title, the term "basic agricultural commodity" means wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products, and any regional or market classification, type, or grade thereof; but the

[3] "Sugar beets and sugarcane" were added to this list by Sec. 1 of the Jones-Costigan Sugar Act, c. 263, 48 Stat. 670; "cattle" by Sec. 1, "peanuts" by Sec. 3 (b), "rye, flax, and barley" by Sec. 4, and "grain sorghums" by Sec. 5 of the Jones-Connally Cattle Act, c. 103, 48 Stat. 528; "potatoes" by Sec. 61 of the Act approved August 24, 1935.

Secretary of Agriculture shall exclude from the operation of the provisions of this title, during any period, any such commodity or classification, type, or grade thereof if he finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that the conditions of production, marketing, and consumption are such that during such period this title can not be effectively administered to the end of effectuating the declared policy with respect to such commodity or classification, type, or grade thereof.

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of this title. Such sum shall remain available until expended.

(b)[4] In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate

[4] Section 3 of the Act of August 24, 1935 (Public 320, 74th Cong., 1st Sess.) amended the first sentence of this subdivision to read as follows:

"In addition to the foregoing, for the purpose of effectuating the declared policy of this title, a sum equal to the proceeds derived from all taxes imposed under this title is hereby appropriated to be available to the Secretary of Agriculture for (1) the acquisition of any agricultural commodity pledged as security for any loan made by any Federal agency, which loan was conditioned upon the borrower agreeing or having agreed to cooperate with a program of production adjustment or marketing adjustment adopted under the authority of this title, and (2) the following purposes under part 2 of this title: Administrative expenses, payments authorized to be made under section 8, and refunds on taxes."

from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection.

TERMINATION OF ACT

SEC. 13. This title shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall by proclamation terminate with respect to any basic agricultural commodity such provisions of this title as he finds are not requisite to carrying out the declared policy with respect to such commodity. The Secretary of Agriculture shall make such investigations and reports thereon to the President as may be necessary to aid him in executing this section.

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

SUPPLEMENTARY REVENUE PROVISIONS

EXEMPTIONS AND COMPENSATING TAXES

SEC. 15. (a) If the Secretary of Agriculture finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that any class of products of any commodity is of such low value compared with the quantity of the commodity used for their manu-

facture that the imposition of the processing tax would prevent in whole or in large part the use of the commodity in the manufacture of such products and thereby substantially reduce consumption and increase the surplus of the commodity, then the Secretary of Agriculture shall so certify to the Secretary of the Treasury, and the Secretary of the Treasury shall abate or refund any processing tax assessed or paid after the date of such certification with respect to such amount of the commodity as is used in the manufacture of such products.

(b) No tax shall be required to be paid on the processing of any commodity by or for the producer thereof for consumption by his own family, employees, or household; and the Secretary of Agriculture is authorized, by regulations, to exempt from the payment of the processing tax the processing of commodities by or for the producer thereof for sale by him where, in the judgment of the Secretary, the imposition of a processing tax with respect thereto is unnecessary to effectuate the declared policy.

(c) Any person delivering any product to any organization for charitable distribution or use shall, if such product or the commodity from which processed, is under this title subject to tax, be entitled to a refund of the amount of any tax paid under this title with respect to such product so delivered.

(d) The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds, after investigation and due notice and opportunity for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The Secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the

processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, until such rate is altered pursuant to a further finding under this section, or the tax or rate thereof on the basic agricultural commodity is altered or terminated. In no case shall the tax imposed upon such competing commodity exceed that imposed per equivalent unit, as determined by the Secretary, upon the basic agricultural commodity.

(e) During any period for which a processing tax is in effect with respect to any commodity there shall be levied, assessed, collected, and paid upon any article processed or manufactured wholly or in chief value from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession of the United States to which this title does not apply, a compensating tax equal to the amount of the processing tax in effect with respect to domestic processing at the time of importation: *Provided*, That all taxes collected under this subsection upon articles coming from the possessions of the United States to which this title does not apply shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund and paid into the Treasury of the said possessions, respectively, to be used and expended by the governments thereof for the benefit of agriculture. Such tax shall be paid prior to the release of the article from customs custody or control.

FLOOR STOCKS

SEC. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale

or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

(b) The tax imposed by subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held at the date the processing tax first takes effect; but such retail stocks shall not be deemed to include stocks held in a warehouse on such date, or such portion of other stocks held on such date as are not sold or otherwise disposed of within thirty days thereafter. The tax refund or abatement provided in subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held on the date the processing tax is wholly terminated.

EXPORTATIONS

SEC. 17. (a) Upon the exportation to any foreign country (including the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam) of any product with respect to which a tax has been paid under this title, or of any product processed wholly or in chief value from a commodity with respect to which a tax has been paid under this title, the exporter thereof shall be entitled at the time of exportation to a refund of the amount of such tax.

(b) Upon the giving of bond satisfactory to the Secretary of the Treasury for the faithful observance of the provisions of this title requiring the payment of taxes, any

person shall be entitled, without payment of the tax, to process for such exportation any commodity with respect to which a tax is imposed by this title, or to hold for such exportation any article processed wholly or in chief value therefrom.

EXISTING CONTRACTS

SEC. 18. (a) If (1) any processor, jobber, or wholesaler has, prior to the date a tax with respect to any commodity is first imposed under this title, made a bona fide contract of sale for delivery on or after such date, of any article processed wholly or in chief value from such commodity, and if (2) such contract does not permit the addition to the amount to be paid thereunder of the whole of such tax, then (unless the contract prohibits such addition) the vendee shall pay so much of the tax as is not permitted to be added to the contract price.

(b) Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated and shall be collected and paid to the United States by the vendor in the same manner as other taxes under this title. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner of Internal Revenue who shall cause collections of such taxes to be made from the vendee.

COLLECTION OF TAXES

SEC. 19. (a) The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

(b) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, in so far as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: *Provided*,

That the Secretary of the Treasury is authorized to permit postponement, for a period not exceeding ninety days,[6] of the payment of taxes covered by any return under this title.

(c) In order that the payment of taxes under this title may not impose any immediate undue financial burden upon processors or distributors, any processor or distributor subject to such taxes shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act.

B. Section 30 of Public 320, 74th Cong., 1st Sess., approved August 24, 1935:

SEC. 30. The Agricultural Adjustment Act, as amended, is amended by adding after section 20 the following new section:

"SEC. 21. (a) * * *

"(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, deter-

[6] By section 2 of Public 62, 74th Cong., 1st Sess., the Secretary may in his discretion extend this period to not exceeding six months.

mination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

"(c) The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, as determined, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary, and the initiation, if formally approved by the Secretary of Agriculture prior to such date of adjustment programs under section 8 (1) of this title, and the making of agreements with producers prior to such date, and the adoption of other voluntary methods prior to such date, by the Secretary of Agriculture under this title, and rental and benefit payments made pursuant thereto, are hereby legalized and ratified, and the making of all such agreements and payments, the initiation of such programs, and the adoption of all such methods prior to such date are hereby legalized, ratified, and confirmed as fully to all intents and purposes as if each such agreement, program, method, and payment had been specifically authorized and made effective and the rate and amount thereof fixed specifically by prior Act of Congress.

* * * * * * * *

APPENDIX II

Legislative History of the Agricultural Adjustment Act

There is set forth in this appendix, in chronological sequence, according to Congresses, the various bills favorably acted upon by the committees of Congress and involving the fundamental principle of the Agricultural Adjustment Act, namely, control of surplus production of agricultural commodities and the financing of the operations in connection therewith. There are also listed the various committee reports and Congressional hearings and investigations in connection with these bills. These bills, reports, hearings, and investigations are those referred to in the discussion in this brief under the heading "Summary of Legislative History", pages 4 to 11.

68th Congress, 1st Session:

Original McNary-Haugen (Equalization Fee) Bill—Proposed legislation first introduced in Congress January 16, 1924. S. 2012 by Senator McNary, Chairman of the Committee on Agriculture and Forestry of the Senate, and H. R. 5563 by Representative Haugen, Chairman of the Committee on Agriculture of the House of Representatives.

Following extensive hearings (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Purchase and Sale of Farm Products", January 7-26, 1924), the Senate bill was reported to the Senate. (S. Rept. 193, March 1, 1924) When this measure was reached on the Senate calendar its consideration was indefinitely postponed (65 Cong. Rec. 6760, April 21, 1924) at the request of the chairman of the committee, inasmuch as the committee had in the meantime given further consideration to the legislation and reported to the Senate a substitute bill. (S. 3091, accompanied by S. Rept. 410, April 16, 1924)

The House bill was also reported in a revised form (H. R. 9033, accompanied by H. Rept. 631, May 2, 1924) after full hearings (Hearings before the Committee on Agriculture, House of Representatives, entitled "McNary-Haugen Bill", January 21-March 19, 1924) but was rejected by a vote of the House. (65 Cong. Rec. 10341, June 3, 1924)

The principal features of these bills are set forth above in the main text of the brief, pages 8 to 9.

Prior to the consideration of this legislation by either committee, there had been a comprehensive study of the agricultural situation made during the 67th Congress by the Joint Senate and House Commission of Agricultural Inquiry. See, particularly, Part I, Report of the Joint Commission of Agricultural Inquiry entitled "The Agricultural Crisis and its Causes", H. Rept. 408, 67th Cong., 1st Sess. Part II of the report relates to credit, Part III to transportation, and Part IV to marketing and distribution.

The committees also had before them the report of the National Agricultural Conference, called at the direction of President Harding, which advocated, among other matters, Congressional and Presidential steps "to immediately reestablish a fair exchange value for all farm products with that of all other commodities". (H. Doc. 195, 67th Cong., 2nd Sess., p. 186)

Also in the 67th Congress, 2nd Session, the Committee on Agriculture and Forestry, U. S. Senate, held hearings on the agricultural situation, entitled "Stabilizing the Prices of Certain Agricultural Products", January 26-March 22, 1922.

68th Congress, 2nd Session:

Following further hearings (Joint hearings before the Committee on Agriculture and Forestry, U. S. Senate, and the Committee on Agriculture, House of Representatives, entitled "The McNary-Haugen Bill", January 21, 1925; Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricutural Relief", February 2-19, 1925), the legislation was again reported to the House and Senate by the respective committees. (S. 4206, accompanied by S. Rept. 1234, February 26, 1925; H.R. 12390, accompanied by H. Rept. 1595, February 26, 1925) The revised bills eliminated two principal objections urged against the original bill, by requiring purchases of surpluses to be made at the market, rather than the ratio or parity, price and by eliminating incidental authority that had been given to the President to increase tariff duties. No action was taken on the legislation by either House.

69th Congress, 1st Session:

The surplus control legislation was again reported to the Senate by its committee as an amendment to the Co-operative Marketing Bill (H.R. 7893, accompanied by S. Rept. 664, April 13, 1926) but was rejected by vote of the Senate. (67 Cong. Rec. 11872, June 24, 1926) Additional hearings had previously been held by the Senate committee. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "To Promote Cooperative Marketing", March 5-23, 1926; Hearings before Committee on Agriculture and Forestry, U. S. Senate, entitled "Agricultural Relief", March-April, 1926)

The House committee also held further hearings (Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Relief", January 15-April 21, 1926) and thereafter reported a new bill. (H.R. 11603, accompanied by H. Rept. 1003, April 27, 1926) This bill was rejected by vote of the House. (67 Cong. Rec. 9863, May 21, 1926)

The bills in this session substituted a Federal Farm Board for the corporation, provided for removal of surpluses to foreign markets through agreements with agricultural cooperative associations and reimbursement of their losses from the equalization fees, and declared the fee to be a regulation of commerce.

69th Congress, 2nd Session:

The "First" McNary-Haugen Bill—The House committee held hearings (Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Relief", January 7-10, 1927) and thereafter reported to the House H.R. 15474, accompanied by H. Rept. 1790, January 18, 1927.

The Senate committee reported S. 4808, accompanied by S. Rept. 1304, January 24, 1927, which passed the Senate. The Senate committee also held hearings. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Agricultural Relief", January 18-20, 1927)

The House passed without amendment the Senate bill in lieu of the bill reported by the House Committee. (68 Cong.

Rec. 4099, February 17, 1927) The former bill eliminated the import embargo feature and, in consequence, and also in order to avoid the charge of "price fixing", the ratio or parity price provisions. Purchases of surpluses were to be made pursuant to a declared policy to promote orderly marketing, prevent excessive market fluctuations, and preserve advantageous domestic markets.

The bill was vetoed by President Coolidge. (68 Cong. Rec. 4771, February 25, 1927; S. Doc. 214) The President accompanied his veto message with an opinion rendered by Attorney General Sargent. The Attorney General held that the purpose and direct effect of the bill was to fix prices for agricultural commodities, that this was beyond the power of the Congress under the commerce clause, that whether or not the equalization fee was a tax it constituted a taking of property without due process of law, and that both the marketing operations and the equalization fee involved unconstitutional delegations of legislative power. (Cf., speech of Representative L. J. Dickinson of Iowa upon the veto message, 68 Cong. Rec. 5448-5454, March 2, 1927)

70th Congress:

The "Second" McNary-Haugen Bill—Further hearings were held by the House committee. (Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Relief", January 17-February 24, 1928) The committee reported the bill, H.R. 12687, accompanied by H. Rept. 1141, April 5, 1928.

The Senate committee reported the bill, S. 3555, accompanied by S. Rept. 500, March 8, 1928. Both House and Senate bills had been revised to meet some of the Presidential objectons set forth in the veto message. For example, the bills were made applicable to all, instead of merely basic, agricultural commodities, special provision was made for perishables, and the equalization fee was applied to competitive imported food products. In addition, as an initial alternative, provision was made for loans to agricultural cooperative associations to carry out the purposes of the Act unless such loans were found to be ineffective to that end. The Senate bill passed the Senate, but the House committee substituted and reported the text of the House bill.

(H. Rept. 1273) As so amended the bill was passed by the House. In conference a final revised bill was agreed to by the conference committee and passed by both Houses. (H. Rept. 1620, May 12, 1928)

This bill was also vetoed by President Coolidge. (69 Cong. Rec. 9524, May 23, 1928; S. Doc. 141) The veto message was again accompanied with an opinion of the Attorney General. (Cf., speech of Representative L. J. Dickinson of Iowa upon the second veto message, 69 Cong. Rec. 10780-10785, May 29, 1928)

71st Congress:

The Farm Board Act (*Agricultural Marketing Act*)—Additional hearings were held. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Farm Relief Legislation", March 25-April 12, 1929; Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Relief", March 27-April 4, 1929) Thereafter, a bill (H.R. 1) was reported to the House (H. Rept. 1, April 17, 1929) and a bill (S. 1) reported to the Senate (S. Rept. 3, April 23, 1929).

The House bill was passed but in the Senate a new text was substituted and passed. A substitute for both the House bill and Senate amendment was agreed to by the conference committee (H. Rept. 18, June 6, 1929) but rejected by vote of the Senate. (71 Cong. Rec. 2661, June 11, 1929) A further substitute agreed to by a conference committee (H. Rept. 21, June 14, 1929) was passed by both Houses and approved by the President June 15, 1929. (46 Stat. 11)

Under the Act a Federal Farm Board was created. It could undertake surplus control operations through loans to specially-created commodity stabilization corporations controlled by agricultural cooperative associations. The corporations were guaranteed against loss. A half-billion dollar appropriation was provided for the purposes of the Act. No equalization fees or special taxes were provided to raise the necessary revenue for the Treasury. The operations were to be conducted in furtherance of a declared policy to promote effective merchandising of agricultural commodities so that agriculture would be on a basis of economic equality with other industries and to that end, among

other matters, so as to aid in preventing and controlling surpluses through orderly production and distribution.

The Export Debenture Plan—First introduced in the 69th Congress, 1st Session, by Senator McKinley (S. 2289, January 7, 1926) and Representative Adkins (H.R. 7392, January 11, 1926); also in revised form in the 70th Congress, 1st Session, by Representative Jones (H.R. 10762, February 9, 1928), Representative Ketcham (H.R. 12892, April 11, 1928; see H. Rept. 1141, Part 3, April 11, 1928, which accompanied H.R. 12687), and Representative Jones (H.R. 12893, April 11, 1928). It was passed by the Senate as an additional feature of the Farm Board Act but rejected in conference. It was opposed by President Hoover. (See his letter to Senator McNary April 20, 1929, S. Rept. 3, 71st Cong., 1st Sess., pp. 15-17) The plan as passed by the Senate provided for diversion of surplus agricultural commodities to foreign markets at the world price by the issuance of export debentures to exporters of such commodities or their products. These debentures were a form of currency which would be legal tender for payment of customs duties. The debentures equaled one-half the tariff duty on the commodity and 2 cents per pound on cotton, with authorization for reduction in rate to meet increase in production. In effect, the debentures were financed through the customs duties, these taxes being payable in the debentures issued the exporters, thus depriving the Treasury of its full receipts from customs duties.

72nd Congress, 1st Session:

The "Three-Way" Bill—This bill (S. 4536) proposed to amend the Farm Board Act by adding to it as alternatives the equalization fee plan and the export debenture plan (both set forth above) and the compulsory allotment plan. This latter plan provided for segregation of that portion of a farmer's production of an agricultural commodity for any year needed for domestic consumption. Purchasers of agricultural products were required to be licensed and to pay for this domestic allotment the cost of production thereof as proclaimed by the Farm Board. Failure to so pay constituted a criminal offense. Surpluses were controlled indirectly through the compulsory payment of a higher price for the domestic allotment than for the surplus to be ex-

ported or withheld from market or otherwise disposed of off the domestic market by the Farm Board and through automatic decrease of the domestic allotment as production increased. An earlier bill using the "cost of production" formula was the Crisp bill, H.R. 15963, 69th Cong., 2nd Sess. (See H. Rept. 1790, accompanying H. R. 15474, 69th Cong., 2nd Sess., pp. 2-4)

The bill (S. 4536) was reported to the Senate by the Senate committee (S. Rept. 732, May 25, 1932) but subsequently recommitted. (75 Cong. Rec. 13000, June 15, 1932)

Hearings were held by the Senate committee. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Farm Relief Bills, Pertaining to Agricultural Marketing, Abolishing Federal Farm Board and Others", April 26-29, 1932; Hearings before the Committee on Agriculture, House of Representatives, entitled "Farm Marketing Program", February 16-18, 1932, and May 4, 11 and 25, 1932)

72nd Congress, 2nd Session:

The National Emergency Bill—Following extended hearings (Hearings before the Committee on Agriculture, House of Representatives, entitled "Agricultural Adjustment Program", December 14-20, 1932), the House committee reported the bill, H.R. 13991, accompanied by H. Rept. 1816, January 3, 1933. The bill was passed by the House and reported by the Senate committee (S. Rept. 1251, February 20, 1933) but failed of Senate action before expiration of the Congress on March 4, 1933. Hearings were also held by the Senate committee. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, entitled "Agricultural Adjustment Relief Plan", January 25-February 6, 1933)

The bill provided for estimating, on the basis of Government statistics of production and consumption, the percentage of certain basic crops that would be needed for domestic consumption. Each producer was to be given a benefit payment on the same percentage of his "crop marketed" (as reported to the Senate this was changed to "crop produced"). The payment was to equal the difference between the current national average farm price for the commodity and its fair exchange value (parity price)

computed substantially the same as under the present Agricultural Adjustment Act. The payments were to be financed by a processing tax similar to that under the present Act. As passed by the House, the benefit payment to any producer was conditioned upon his reducing acreage in accordance with amounts prescribed by the Secretary of Agriculture. Surplus control also resulted indirectly from the fact that payments would not be made on that portion of production over domestic requirements. The plan was voluntary, gave emphasis to reduction of production, provided a processing tax so as to finance itself, and established a parity price. Much of the present Act, introduced in Congress within a month after the National Emergency Bill was reported to the Senate, is obviously adapted from it.

73rd Congress:

The Agricultural Adjustment Act—Introduced in House and reported to House (H. R. 3835, accompanied by H. Rept. 6, March 20, 1933) following message to Congress by President Roosevelt on March 16, 1933. The message is set forth on page 1 of the House report.

Passed by House March 22, 1933, reported to Senate (S. Rept. 16) April 5, 1933, and passed by Senate with amendments April 28, 1933. Report of conference committee (H. Rept. 100, May 5, 1933) was agreed to by both Houses and, on May 12, 1933, bill was approved by President. (48 Stat. 31)

The House report (H. Rept. 6, p. 2) refers to House and Senate committee hearings of the preceding session and also to hearings before the Committee on Finance, U. S. Senate, 72nd Congress, 2nd Session, entitled "Investigation of Economic Problems", February 13-28, 1933. (See particularly pages 108-162 of the hearings) Also the Senate Committee held hearings of its own. (Hearings before the Committee on Agriculture and Forestry, U. S. Senate, 73rd Cong., 1st Sess., entitled "Agricultural Emergency Act to Increase Farm Purchasing Power", March 17-28, 1933.

Compulsory Allotment Plan—This plan was first acted on by Congress in the 72nd Congress, 1st Session. See description above in this appendix under "72nd Congress, 1st

Session". It was included with modifications as an alternative feature of the Agricultural Adjustment Act as passed by the Senate but rejected in conference. The plan provided for payment to the farmer by purchasers of farm products of cost of production plus a reasonable profit, enforced by criminal penalties and a license system.

74th Congress, 1st Session:

Amendments to Agricultural Adjustment Act—The amendments pertinent to the present litigation were introduced in the House as H. R. 8052 on May 14, 1935, and reported to the House (H. Rept. 952) on May 15, 1935.

Following the decision in *Schechter Poultry Corp.* v. *United States,* decided May 27, 1935, 295 U. S. 495, this House bill was superseded by H. R. 8492, June 14, 1935, which was reported to the House (H. Rept. 1241) on June 15, 1935, and passed June 18, 1935. The Senate committee reported this bill with amendments. (S. Rept. 1011, July 3, 1935) The bill was amended and passed by the Senate July 23, 1935, an agreement reached in conference (H. Rept. 1757), and approved by the two Houses. The bill was approved by the President August 24, 1935. (Public No. 320)

See, also, pamphlet printed by the Committee on Agriculture and Forestry, U. S. Senate, for its use, entitled "Agricultural Adjustment Act—Constitutionality of the Agricultural Adjustment Act as amended by the Bill H. R. 8492", prepared by the Solicitor, Department of Agriculture.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 401

UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM M. BUTLER, ET AL., Receivers of Hoosac Mills Corporation.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE MOUNTAIN STATES BEET GROWERS MARKETING ASS'N

and

THE NATIONAL BEET GROWERS ASSOCIATION, AMICI CURIAE

CLAY R. APPLE,
Counsel.

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STATEMENT

This brief is filed jointly by The Mountain States Beet Growers Marketing Association, a cooperative organization of farmers in Colorado, and The National Beet Growers Association, a farm organization comprised of twelve member associations in eight States, upon the farms of

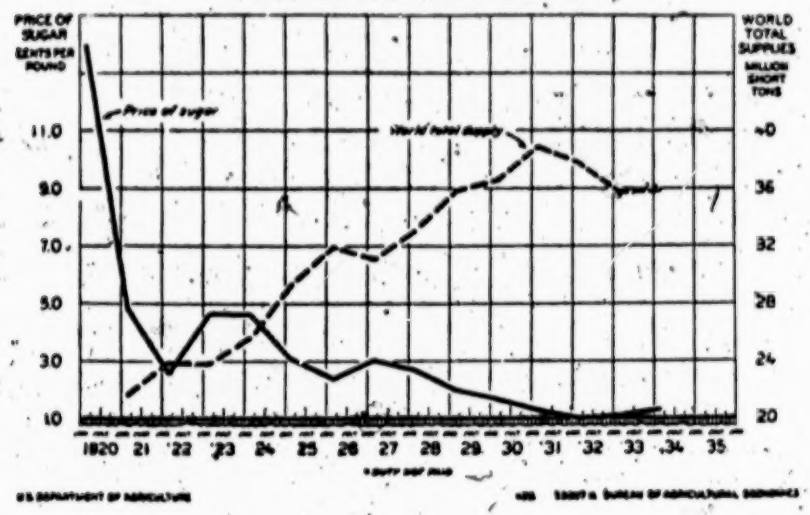
whose members are raised a large part of the sugar beets produced within the continental limits of the United States, together with other basic agricultural products. Most of the 16,000 members of these Associations produce other agricultural products, including the crops of wheat and corn, declared to be basic crops by the Agricultural Adjustment Act.

The crop in which the members of this Association are primarily interested has never produced an exportable surplus. In fact, within the continental limits of the United States is raised only about twenty per cent of the total sugar consumed. Nevertheless, the very low price of sugar, resulting primarily from continued increased production of our Island possessions and foreign countries resulted in such world surpluses that at the time the Act was passed the industry was almost completely demoralized. (World Trade Barriers in relation to American Agriculture, Senate Document No. 70, 73rd Congress, 1st Session, pp. 266-288.)

CHARTS

No. 1

WORLD SUPPLY OF SUGAR AND NEW YORK PRICE* OF SUGAR, 1920 TO DATE



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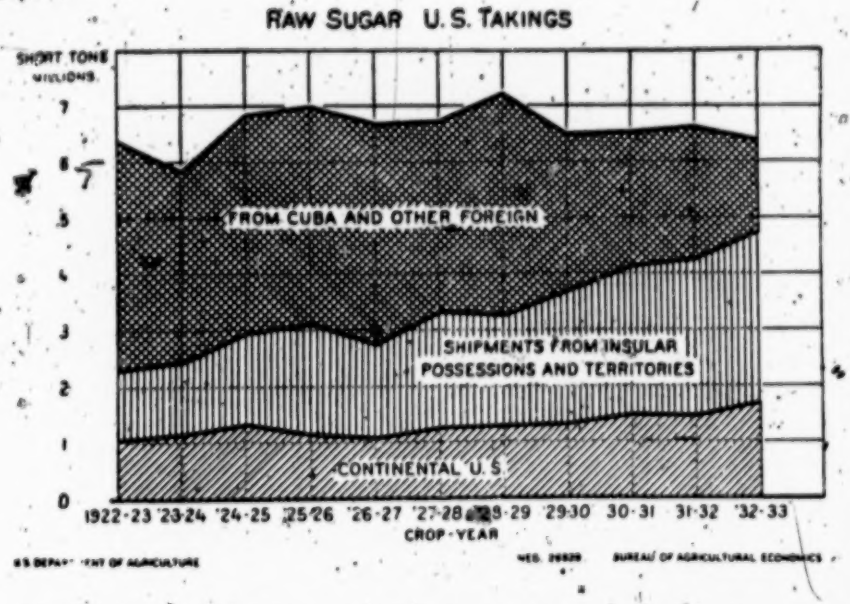
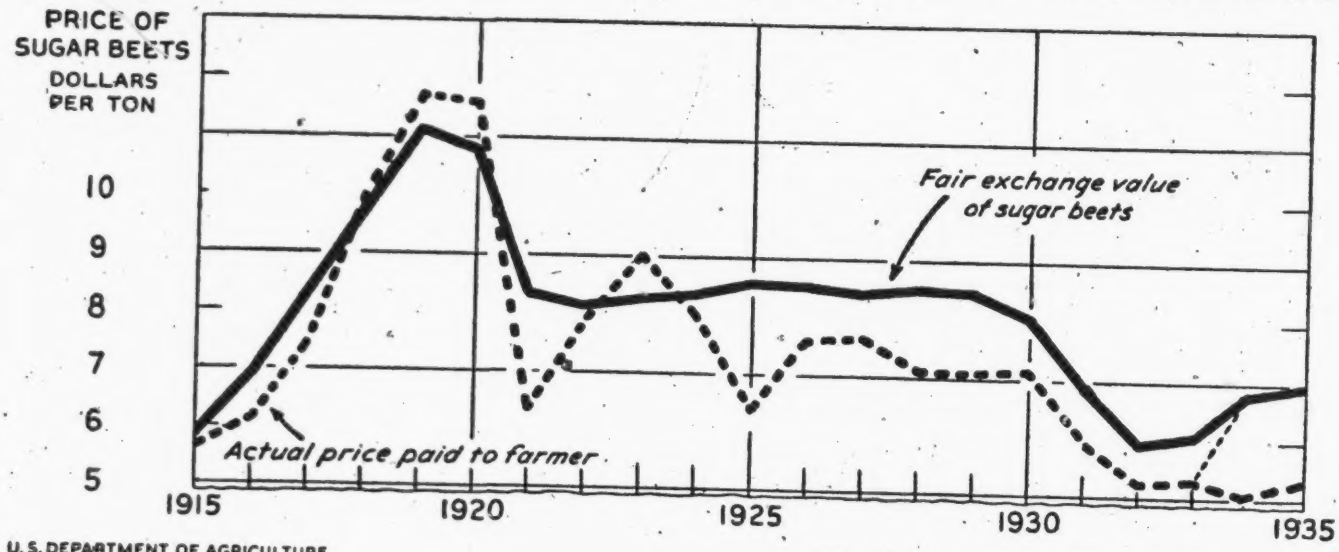


We do not say that it is the duty of the Court to be concerned with the economic results of the Act. However, *amici curiae* do desire to say, that so far as the production of sugar within the continental limits of the United States is concerned, it appears that Congress adopted a sound economic policy in the enactment of the legislation. While in 1932 the average price per ton received by the farmer for sugar beets was much under the parity price the chart below shows that farmers are now receiving the full parity price. In other words a ton of sugar beets now can be exchanged for the same amount of products bought by farmers, as the amount for which a ton of sugar beets could be exchanged during the base period.

Chart No. 3 graphically explains the condition. It shows that prior to the application of the Act the farmer had not received a parity price for this product since the year of 1924. The dotted connecting line at the right of the chart shows the price paid to the farmers for the year of 1934 to join the fair exchange value line. This connecting line

No. 3

FARM PRICE AND FAIR EXCHANGE VALUE OF SUGAR BEETS, 1915-35



U. S. DEPARTMENT OF AGRICULTURE

NEG. 29674 BUREAU OF AGRICULTURAL ECONOMICS

represents the benefit payment resulting from the processing tax which, with the quota provisions, makes the total price received by the farmer equal the fair exchange value. (Page 4.)

While the legislation pertaining to the sugar industry is also concerned with quota provisions not pertinent to the issues of this case, still the Agricultural Adjustment Act in its entirety, including the processing tax, is regarded as indispensable to the farmers welfare, if not to the very existence, of the sugar industry within the continental limits of the United States.

These thousands of farmers and the people indirectly dependent thereon are vitally concerned that the processing tax, as a means of raising revenue, be retained and that the law be declared constitutional.

It is worthy of note here that land cultivated for the production of sugar is thereby removed from the production of crops of which there is an exportable surplus. That in its relation to the whole farm problem and thereby to the problem of the general welfare of the United States the operation of the processing taxes, combined with the other provisions of the Sugar Law not considered in this case, have achieved the goal set by Congress in the Agricultural Adjustment Act, namely a restored purchasing power.

JURISDICTION—STATEMENT OF FACTS

For the purposes of this brief there is adopted the statements found in the brief for the United States with respect to the opinions below, the jurisdiction of this Court, the question presented, the facts, the specification of errors to be urged, and the scope of the Agricultural Adjustment Act.

SUMMARY OF ARGUMENT

The discussion of constitutionality in this brief will be confined to one general proposition, namely

that the operation of the Agricultural Adjustment Act is like a long established and approved use of the taxing power and does not violate either the Fifth or the Tenth Amendments to the Constitution.

In view of the comprehensive scope of the brief filed on behalf of the Government it would be presumptuous of us to seek to make any material contribution of facts showing the general condition of agriculture and its relation to national economic welfare. Likewise we believe it unwise to attempt to add anything but rather to indorse the exposition of the brief for the United States upon the following proposals.

1. That Congress has not attempted any unlawful delegation of legislative power.
   Hampton & Co. vs. *United States,* 276 U. S. 394.
   Field v. *Clark,* 143 U. S. 649.
   Avent v. *United States,* 266 U. S. 127.
2. That the taxes provided by the Agricultural Adjustment Act (a) are excises and (b) meet the requirement for uniformity throughout the United States.
   Patton vs. *Brady,* 184 U. S. 608.
   McCray vs. *United States,* 195 U. S. 27.
   Knowlton vs. *Moore,* 178 U. S. 41.
3. That Congress has power to lay excise taxes and appropriate the monies received to provide for the general welfare of the United States.
   Constitution, Article I, Section 8, Clause 1.
   Holmes vs. *Jennison,* 14 Pet. 538, 570-571.
   United States vs. *Gettysburg Electric Railway,* 160 U. S. 668.

ARGUMENT

It is respectfully urged that the collection of the processing and floor taxes, the subsequent appropriations for and the making of benefit payments is a use of the taxing power and other fiscal powers of the Government not unlike a

long established and approved use. It is the use of the taxing power found in Article I, Section 8, Clause 1, of the Constitution for the general welfare.

LIKE USE OF TAXING POWER HAS BEEN APPROVED

Congress is given power:

> "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general welfare of the United States; * * *"

From the time of the very first Congress this power has been used not only for the raising of revenue by the Government, but likewise for the protection of manufactures.

The evidence is indisputable that those who participated in the framing of the constitution intended that manufacturing industries should be encouraged by a protective tariff. Many members of the Constitutional Convention of 1787 were members of the first Congress. The second Act adopted by the first Congress of the United States, July 4, 1789 (Chap. 2, 1 Stat. at L. 24), contained the following recital:

> "Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and for the *encouragement* and *protection* of *manufactures* (412) *that duties be laid on goods, wares and merchandises imported.*" (Italics supplied.)

It is inconceivable that Congress in the levy and collection of tariff duties would have had in mind the purpose of giving to manufactures a special privilege. On the contrary, the use of the taxing power for this purpose in the beginning was unquestionably intended as a use thereof to provide for the general welfare of the United States. This

early Congress not only sought to use the taxing power in the one way for the promotion of the general welfare but it established still another precedent for the use of the power, going even further than that used in the Agricultural Adjustment Act, by providing for what are known as the "cod fish bounties".

Section 4 of the Act, *supra,* provided:

> "That there shall be allowed and paid on every quintal of dried, and every barrel of pickled fish, of the fisheries of the United States, and on every barrel of salted provision of the United States, exported to any country without the limits thereof, in lieu of a drawback of the duties imposed on the importation of the salt employed and expended therein, viz:
> "On every quintal of dried fish, five cents.
> "On every barrel of pickled fish, five cents.
> "On every barrel of salted provision, five cents."

The provision for the bounty was continued in the next session of Congress. (Act of August 10, 1790, 1 Stat. 180, 181, 182.)

It is significant that this early interpretation of the powers of Congress, by those who helped frame the Constitution, established a precedent so nearly like the use of the power under the Act in consideration.

Under the Agricultural Adjustment Act as well as under the cod fish bounties there was legal consideration for the payment but while the fishermen performed only affirmative acts the farmers by contract give up definite property rights.

We find that in his Report on Manufactures, Hamilton (3 Annals of Congress, Appendix P. 1011) in 1791 stated that such measures are constitutional, within the provisions to provide for the common defence and general welfare with no other qualifications than that "all duties, imposts and excises, shall be uniform throughout the United States".

Hamilton's view was further like the effort of the present act to remove disparity, in that he proposed "to lay a duty on foreign manufactures of the material, the growth of which is desired to be encouraged, *and to apply the produce of that duty by way of bounty,* either upon the *production* of the material, or upon its *manufacture* at home, or upon both". * * * (P. 1010) (Italics supplied.)

At that time there were practically no industries. Approximately 90 per cent of our population was engaged in agricultural pursuits. Such industries as existed were indeed "infant" when contrasted with the present organizations. The idea prevailed that national existence required the use of the taxing power for the encouragement of industry. Reading discloses that these makers of the Constitution did not foresee the day when most of our people would be engaged in occupations other than agricultural. We are persuaded that they could not possibly foresee such an integrated, interdependent and complicated society as we now have. However, it is well settled that they intended the power given Congress to be adequate to meet the changing conditions of the time.

> "A constitution intended to endure for ages to come and consequently to be adjusted to the various crises of the human affairs." *McCullock* vs. *Maryland,* 4 Wheat. 316, 407, 4 L. ed. 579, 601.
>
> *Home Building and Loan Association* vs. *Blaisdell,* 290, U. S. 398, 78 L. ed. 413, 431.

The fact that an early Congress did not use the taxing power for the encouragement of agriculture as it did for the promotion of industry is not to say that the power did not exist. There is nothing in the wording of the Constitution which would in any way imply that the founders of our Government intended the use of the taxing power only for the encouragement of one industry and not for another. The plain words of the clause not only show the contrary

to be true, but the legislation adopted and the opinions expressed by the men of the times support our contention.

At no place in the Constitution do we find the words that Congress shall have power "to protect the manufacturing industries". Nevertheless, it would be idle to deny that, in the legislation adopted throughout our history, the power given in Article I, Section 8, Clause 1 of the Constitution not only has been exercised for the purpose of raising revenue but that the motive of protection has been constantly present.

As this Court said, in *Hampton & Co.* vs. *United States*, 276 U. S. 394, the fact that there may have been other motives than the raising of revenue will not prevent the operation of the Act. It is also said in Hampton Case, *supra*:

> "It undoubtedly is true that during the political life of this country there has been much discussion between parties as to the wisdom of the policy of protection, and we may go further and say as to its constitutionality, but no historian, whatever his view of the wisdom of the policy of protection, would contend that Congress since the first Revenue Act in 1789 has not assumed that it was within its power in making provision for the collection of revenue to put taxes upon importations and to vary the subjects of such taxes or rates in an effort *to encourage the growth of the industries of the nation by protecting home production* against foreign competition." (Italics supplied.)

There has been much debate on the wisdom of the policy of protection, but this Court has not denied the exercise of the power to make the policy effective. The first Congress laid duties, to establish the policy of protection of manufactures, not we think, with the idea that manufacturers should have a special privilege as against the other portions of the population but with the idea of promotion of the general welfare.

THE MOTIVE IN THIS ACT IS TO PROVIDE FOR THE GENERAL WELFARE

In passing the Agricultural Adjustment Act it is submitted that Congress was not thinking of the welfare of the individual farmer, or of the farm population alone, but was trying to restore the purchasing power of the farm population of the Nation "for the general welfare of the United States". In the Declaration of Emergency (c. 25, 48 Stat. 31, Title I) this intention is clear:

> "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with *a national public interest.*" (Italics supplied.)

Congress found and determined that, to sustain the general welfare of the country, there could no longer exist such a wide disparity between the price which the farm population received for its products and the price this population had to pay for the products which farmers must buy. This disparity in price was undoubtedly due in part to the result of the policy of protection for industries other than agriculture.

It is not the problem for the Court to determine whether the policy of processing taxes and subsequent appropriations therefrom is a wise policy. It is a matter of common knowledge, however, that the disastrous condition of agriculture and its resulting demoralization upon all the industry and commerce within the United States justified the

Congress in adopting a policy to eliminate, if possible, this disparity in price. That Congress intended to adopt such a policy is clear from reading Section 2 of Title I, the Declaration of Policy:

> "To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August, 1909-July, 1914." * * *.

THERE IS NO VIOLATION OF THE FIFTH AMENDMENT

It has been argued that the result of this policy is the appropriation of money for private purposes. We respectfully urge, however, that in its ultimate results the operation of the various features of the Agricultural Adjustment Act are no different than the operation of the policy of protection for manufacturing industries.

In the West this Act has come to be known as the "Farmers Tariff". It can be contended no more logically, that this exercise of the taxing power is for the benefit of the farmer alone, than that the protective tariff is for the benefit of the manufacturer alone. The immediate economic effect of a protective tariff on imports is to prevent a low priced surplus and thereby to give to the protected industry the power to receive a greater price for its product, just as the immediate economic effect of reduction in acreage and the production of crops, in consideration of benefit payments, is to give the farm population an increased price for its product. The method of producing the result is not exactly the same, but the economic effect of the plan is the

same and in both it is brought about through the exercise of the taxing power.

Both methods are used for the encouragement of a great unit of our national economic organization. It need hardly be argued that one great sector of our population cannot indefinitely continue with a higher price structure than that afforded another great portion without injury to the general welfare. The Agricultural Adjustment Act seeks to equalize this price structure for the benefit of the whole Nation.

It is the purchasing power of the farmers in relation to other elements of society with which Congress is concerned in the Agricultural Adjustment Act. The policy of protection of industry has been maintained upon the belief that a strong manufacturing industry would create a greater purchasing power for the products of the farms. It is submitted now that a healthy condition of agriculture creates a strong purchasing power for the products of other industries. Whether or not the policy of protection has been economically sound in the maintenance of a protective tariff for industry, the taxing power has been exercised with the motives of better wages for labor, a better home market, a higher standard of living, in short "for the general welfare of the United States".

Both under the Agricultural Adjustment Act and under laws for the protection of industries there is an effort to protect the population within the country from the ruinous effects of world surpluses. It is the effect of a low world price which it is sought to avoid.

If the constitutionality of a taxing law is to be measured by the test;—Does it actually produce revenue?—then, the provisions of the Agricultural Adjustment Act cannot be said to be in conflict therewith. Millions of dollars of revenue have been derived. ("Internal Revenue Collections,

Fiscal Year 1935".) Published by the Treasury Department.

The application of this test to the Agricultural Adjustment Act shows it to be far superior in results to the operation of tariff duties on imports.

The tariff acts of recent years have been advanced to levels so high as to reduce the volume of imports and to actually reduce net revenue. (P. 433-435, Statistical Abstract of the United States 1934.)

A study made by the Tariff Commission in response to a Senate request (Senate Document No. 180, Part 1, 72nd Congress, 2nd Session) revealed 873 items (covering considerably more than that number of articles) on which duties are laid under the Tariff Act of 1930, but of which imports into the United States in 1931 constituted less than five per cent of domestic production. The Tariff Commission, cited above, found that there are 635 items specified in the Tariff Act of 1930 on the imports of which, in 1931, the duties assessed amounted to more than 50 per cent ad valorem.

If there is protection of industry, in addition to production of revenue, the legislation is not void. This is true though the principal effect of the law is protection of industry rather than the raising of revenue. (See *McCray* vs. *United States*, 195 U. S. 27 and *Magnano Co.* vs. *Hamilton*, 292 U. S. 40.)

This survey of the early legislation of our Congress affecting the fisheries, the continued practice of protective tariffs and the operation of the Agricultural Adjustment Act shows all of necessity must be of the same effect so far as being in accord with the provisions of the Fifth Amendment to the Constitution.

Protection by the tariff wall has been declared constitutional by this Court in the only case in which the question was squarely before the Court.

"The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection since the Revenue law of 1789 are matters of history." • • •

"More than a hundred years later, the titles of the Tariff Acts of (July 24) 1897 (30 Stat. at L. 151, Chap. 11), and (August 5) 1909 (36 Stat. at L. 11, Chap. 6), declared the purpose of those acts, among other things to be that of encouraging the industries of the United States. The title of the Tariff Act of 1932, of which § 315 is a part, is, 'An Act to Provide Revenue, to Regulate Commerce with Foreign Countries, to *Encourage the Industries* of the United States and for Other purposes'. Whatever we may think of the wisdom of a protection policy, *we can not hold it unconstitutional.*" (Italics supplied.)

Hampton, Jr. & Co. vs. *United States,* 276, U. S. 394.

THERE IS NO VIOLATION OF THE TENTH AMENDMENT

Under the Agricultural Adjustment Act the farm population is not told what it shall raise nor how much nor under what conditions. Farmers have the same privilege of exercising all the liberties of citizenship common to those engaged in the industries.

Under the Act farmers have the same option to contract for reducing production and to receive benefit payments therefor or to stay without the program if they so desire just as the States had in the statute considered and upheld in the case of *Massachusetts* vs. *Mellon,* 262 U. S. 447. That farmers are not being "regimented" in any harmful manner under the Act seems to be clearly shown by the overwhelming vote they have registered for the continuation of these programs. This is truly economic as well as political democracy. Just as under a protective tariff those engaged in industry have not been compelled to participate in, nor refrain from, production, so under the Agricultural Adjustment Act each and every farmer is entitled

to the same right. Whether or not, and to what extent a man may engage in agriculture is a matter of his own economic ability and his own free will. It is only if and when he chooses by contract, that the aid of the governmental organization gives cooperation but not coercion nor control. Thus it is seen that this use of the taxing power does not usurp any powers reserved to the people but is an exercise of the power expressly given the national government to provide for the general welfare which has been a continuing policy of our government from the time of its creation to the present day.

Likewise the legislation is not the use of a power reserved to the states by the Tenth Amendment to the Constitution. This use of the taxing power is not shown to be in conflict with the rights of any state nor is it shown that the exercise of its sovereign powers have been denied any state. As the words "Duties" and "Excises" are used in the taxing power clause (Article I, Section 8, Clause 1), both are of equal standing and must be construed of equal force. It is not said in the Constitution that "Duties" may be used by Congress with certain motives and for one purpose, while "Excises" must be used only with other motives and for a different purpose.

The Constitution, without any distinction, says that both duties and excises may be used to—provide for the—general welfare of the United States.

Therefore it surely cannot be contended that Congress does have the power to lay Duties to protect the industries and at the same time to argue that the exercise of the power of laying Excises for the encouragement of farming is a power reserved to the States. The latter is not the attempted exercise of a new power. It is merely a like use of the same power common throughout our history. We must conclude, therefore, that there is no violation of the Tenth Amendment.

CONCLUSION

In conclusion it is submitted that not only the economic results justify the judgment of Congress in passing the Act, but that the decisions of this Court sustaining the long established use of the taxing power for the production of like results in industry, make it proper that the law be declared Constitutional. To deny the exercise of the same power for the encouragement of that great portion of our population engaged in agriculture would seem not only inconsistent with the ruling of this Court, but also contrary to the general welfare of the United States, because when the farm population has lost its purchasing power, the economic welfare of the nation as a whole must collapse. We respectfully submit that the Act should be upheld and that the decision below should be reversed.

Respectfully submitted,

CLAY R. APPLE, *Counsel for*
The National Beet Growers Association
and
The Mountain States Beet Growers Marketing Assn.

FILE COPY
No. 401
DEC 4

In the Supreme Court of the United States

OCTOBER TERM, 1935.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER ET AL.,
RECEIVERS OF HOOSAC MILLS CORPORATION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FILED BY MALCOLM DONALD AS AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF COTTON MANUFACTURERS

MALCOLM DONALD,
EDWARD E. ELDER,
HERRICK, SMITH, DONALD & FARLEY,
Boston, Massachusetts.

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Miscellaneous.

Adams, James Truslow, *America's Tragedy*, page 20 ... 55n.

Agricultural Adjustment, Report of the Administration of the Agricultural Adjustment Act, May, 1933 to February, 1934, pages 1, 3, 4, 5, 6, 7, 9, 10, 23, 27, 28, 29, 38, 39, 40, 43n, 69, 271, 278, 331, 332 ..... 5, 19, 20, 21, 22, 23, 24, 25, 26, 32, 33-35, 39, 222n.

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BEARD, CHARLES A., *Economic Origins of Jeffersonian Democracy,* pages 34-73..... 139n.

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BRYAN, WILLIAM JENNINGS, *Central Law Journal, 1908*, page 273; *Quoted in Thompson, Federal Centralization*, page 364 ..... 63, 64

CHANNING, EDWARD, *History of the United States (Letter, Trist to Van Buren)*, page 162 ..... 127n., 128

Congressional Debates, Vol. III,
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Cotton Regulations, Series 1, Supplement 1, approved September 18, 1933 32
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Cotton Textile Industry, 74th Congress, first session, Document #126—Report by President to Congress August 21, 1935, page 61 ..... 211, 212

COX, A. B., *The Cotton Situation Approaches a Crisis* ... 29n.

DEPARTMENT OF AGRICULTURE, *Economic bases for the Agricultural Adjustment Act, 1933*, page 6 22

Economics of the Recovery Program, pages 24, 157 ..... 28n.

FARRAND, MAX, *Records of the Federal Convention*, Vol. III
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FEDERAL TRADE COMMISSION, *The Textile Report*, part II, page 18 ..... 5n.

Federalist—Ford's Edition
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FORD, PAUL LEICESTER, *Pamphlets on the Constitution*, page 71 107

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JACKSON, ANDREW, on Madison's Veto, *Elliot's Debates*, 2nd Ed., Vol. IV, pp. 526-7..... 150n.

JEFFERSON'S *Works*, Vol. IV, Washington Ed., pages 457, 524, 525..... 129, 166

McMASTER, JOHN BACH & STONE, FREDERICK D., EDITORS, *Pennsylvania and the Federal Constitution*, page 595 119-120

MADISON, JAMES, *Letters and Other Writings* published by order of Congress (Madison's *Works*)

Letter to Pendleton, January 12, 1792, Vol. I, pages 546, 547 .....124, 128

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MADISON, JAMES, *Debates in Federal Convention of 1787*, Hunt & Scott Edition, page 75

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MADISON, JAMES, *Report on Virginia resolutions, Elliot's Debates, Second Edition,* Vol. IV, pages 528, 550, 551-553 .....117, 125, 145

MORISON, SAMUEL ELIOT, *History of the United States,* 1783-1917, pages 38-39..... 55n.

North Carolina State Records, Vol. XX, pages 777-779... 88

NOURSE, EDWIN GRISWOLD, *Legal Status of Agricultural Cooperation.* 46

RICHARDSON, J. D., *Messages and Papers of the Presidents*

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Madison, Annual Message, 1815, and Veto Message, 1817, pages 567-568, 584-585..... 149

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SANDBURG, CARL, *Abraham Lincoln's, The Prairie Years*, page 489 133

SPARKS, JARED, *Life of Gouv. Morris*, Vol. III, pages 260-265 127

STORY, JOSEPH, *Commentaries on the Constitution, Fifth Edition*, Vol. I, pages 173, 218, 663, 672-673, 717-727, 728 ..... 72, 75-76, 130, 163, 166, 172

TAFT, WILLIAM HOWARD, *Popular Government*, page 155. 63n.

TUCKER, JOHN RANDOLPH, *Constitution of the United States*, page 480 81

TUCKER, HENRY ST. GEORGE, *American Bar Association Journal*, pages 363, 465, 468. ..... 112n.

United States Census Report for 1933, Census of Manufacturers, Cotton Goods ..... 5n.

WARREN, CHARLES, *Congress as Santa Claus*, pages 12, 20, 21, 92, 93 ..... 133, 146-147, 159

The Making of the Constitution, page 218 ..... 74-75, 76

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WILSON, WOODROW, *Constitutional Government in the United States*, pages 45, 179, 182, 183, 191, 192 ..... 62, 63, 76

History of the American People, Vol. III, page 110 ..... 127n.

In The

Supreme Court of the United States

OCTOBER TERM, 1935

No. 401.

UNITED STATES OF AMERICA
Petitioner,

v.

WILLIAM M. BUTLER et al.,
Receivers of Hoosac Mills Corporation,
Respondents.

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The undersigned respectfully petitions this Honorable Court for leave to file this brief as *amicus curiae* in the above entitled suit.

Your petitioner asks to file said brief on behalf of the National Association of Cotton Manufacturers, an association composed of a majority of the cotton mills located in the north and east sections of the United States, comprising some of the largest mills in the country.

The members of this Association process cotton in conducting their business, and against practically all of them the United States has asserted the right to collect

processing taxes under the provisions of the Agricultural Adjustment Act. They are, therefore, vitally interested in a decision of the Constitutional questions presented in the above-entitled suit.

The Solicitor General of the United States and counsel for the Respondents have assented to the filing of this brief and their written assents are filed herewith.

MALCOLM DONALD

On Behalf of
National Association of Cotton Manufacturers.

Boston, Massachusetts,
November 30, 1935.

No. 401.

In the Supreme Court of the United States

OCTOBER TERM, 1935.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER ET AL.,
RECEIVERS OF HOOSAC MILLS CORPORATION.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FILED BY MALCOLM DONALD AS AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF COTTON MANUFACTURERS

This brief is filed by Malcolm Donald as Amicus Curiae on behalf of The National Association of Cotton Manufacturers, an association composed of a majority of the cotton mills located in the north and east sections of the United States.

I.

PRELIMINARY MATTERS.

A. BRIEF STATEMENT OF THE CASE.

This case arose in connection with the receivership proceedings of Hoosac Mills Corporation. The United States filed in said proceedings a claim for certain processing and floor stock taxes, totaling $81,694.28, levied under the Agricultural Adjustment Act for cotton processed in the period, August 1, 1933 to October 7, 1933.

The receivers reported that the claims for these taxes should be disallowed. The District Court for the District of Massachusetts held the taxes valid. On appeal, the Circuit Court of Appeals for the First Circuit reversed the District Court on the grounds that the Act unlawfully delegated legislative power to the Secretary of Agriculture and because the legislation invaded the rights of the states.

B. ISSUES DISCUSSED IN THIS BRIEF.

The issues discussed in this brief are as follows:

First: Can Congress, by reason of its right to levy taxes to provide for the "general welfare of the United States" impose taxes to be paid to cotton growers who conform to its plan to restrict the production of cotton, and by this means regulate the production of cotton?

Second: Can Congress so regulate the production of cotton in order to carry out its fiscal policies?

Third: Do taxes so imposed on cotton manufacturers, to be paid cotton growers who reduce their production for the purpose of enabling cotton growers to obtain higher prices for their product, and thereby, and by reason of the payments so made them, receive a fair share

of the national income, violate the due process of law clause of the Fifth Amendment?

C. IMPORTANCE OF THE QUESTIONS.

It is hardly necessary to point out the importance of these questions.

1. As respects the cotton textile industry of the country the case involves the question of whether the United States can lawfully impose an excise tax upon cotton mills for the purpose of making payments to cotton growers, for the express purpose of inducing cotton growers to reduce the amount of cotton grown in order to increase the price of this raw material which the mills must purchase.*

2. The case involves another question of still more far reaching importance. If this legislation is held constitutional, the United States by offering benefits to those who accede to its plans can accomplish the control over the internal affairs of the states which was denied it in

---

*NOTE. The cotton textile industry must pay taxes amounting to approximately $116,000,000 annually (Agricultural Adjustment Report, 1933-1934, p. 29) for the purpose of taking out of production a substantial percentage of the cotton acreage of the country and for the express purpose of increasing the price of cotton—the principal raw material used by the mills—approximately an equal amount. As the total value of the goods produced in 1933 by the cotton textile industry was $861,170,352, the processing taxes alone amount to 13.4% of that value. The price of cotton has risen from 6 cents to 12 cents since the legislation was enacted. (See U. S. Census Report, 1933: Census for Manufacturers, Cotton Goods.) If the portion of this increased cost resulting from the reduction program of cotton used by the mills be estimated at the rate of 3 cents per pound on the amount of cotton estimated by the Secretary of Agriculture to be used by the mills—5,523,809 bales—there is an added cost of $82,857,000 annually imposed on the mills or 9.5% of the value of goods produced in 1933, making a total added cost of approximately 23%.

The processing taxes paid by 206 companies spinning and weaving cotton in the period January 1 to June 30, 1934 were 40% of the wages paid in that period (Federal Trade Commission, The Textile Report, Part II, p. 18).

Schechter v. *United States* (55 Sup. Ct. Rep. 837) and in the long line of cases, the principal of which was reaffirmed in the *Schechter* case. If the United States has power so to control the internal affairs of the states this will destroy the "authority of the States over matters purely local" which is "essential to the preservation of our institutions" (*Hammer* v. *Dagenhart,* 247 U. S. 251, 275).

D. SUMMARY OF OUR ARGUMENT.

Our contentions are, briefly, as follows:

THE PROCESSING TAXES ARE AN INTEGRAL PART OF THE SCHEME TO RESTRICT PRODUCTION.

1. The Agricultural Adjustment Act provides that the Secretary of Agriculture may make benefit payments to farmers producing basic commodities who agree to restrict their production of such commodities. The processing tax on each commodity goes into effect only when the Secretary of Agriculture determines to make benefit payments in respect to such commodity. It terminates when such benefit payments cease. The scheme to restrict production is not authorized in order to levy taxes; the taxes are levied in order to provide the essential means of carrying out the scheme. They are an integral part of the scheme, and clearly would not have been authorized if the scheme had not been authorized. If the scheme is unlawful, the taxes are necessarily unlawful, being levied for the sole purpose of carrying out the unlawful scheme. As a matter of fact, if the Secretary of Agriculture cannot lawfully determine to put the scheme into effect, then by the very terms of the Act itself, no tax can be imposed.

THE SCHEME CONSTITUTES A GIGANTIC COMBINATION IN RESTRAINT OF PRODUCTION.

2. The scheme constitutes a gigantic combination to limit the production of agricultural products in order to increase prices of such products. Its object is to give to farmers a fair share of the national income by taxing processors in order to make payments to such farmers as agree to reduce their production. By reducing production, it is planned that higher prices will be obtained by farmers for the reduced amount of products, and such higher prices, plus the benefit payments, will give farmers a fair share of the national income, which the Act determines is the proportionate share they received in 1909 to 1914.

In carrying out the plan with respect to cotton, the Secretary of Agriculture, immediately upon the passage of the Act, entered into contracts with over 1,000,000 cotton growers under the terms of which 10,000,000 acres of growing cotton were ploughed up during the season of 1933 out of a total acreage of approximately 40,929,000, and the production of cotton was reduced by 4,400,000 bales, or approximately 80% of the amount annually consumed in the United States, and in 1934 15,000,000 acres were taken out of cultivation. The annual cotton taxes levied for the purpose of making these payments and paying the expenses in connection therewith are approximately $116,000,000 annually.

IF THIS LEGISLATION IS LAWFUL, THE UNITED STATES HAS ALMOST UNLIMITED POWER OVER PRODUCTION IN THE STATES.

3. It is clear that if the United States has the power to pay such benefits to those who consent to carry out such a scheme, it follows that Congress has power to carry into effect in the States any policy which it pleases in respect to agriculture, manufacturing, mining, labor relations, or

otherwise. There are few, if any, things it can not accomplish if sufficient inducement is offered.

The power to tax is the power to destroy. A power, backed by the taxing authority of the United States, to confer benefits on those who conform to its wishes and to withhold benefits from others is a power to coerce or destroy those who do not conform.

FUNDAMENTAL PRINCIPLE THAT POWER GRANTED UNITED STATES SHOULD NOT BE SO CONSTRUED AS TO NULLIFY POWERS CLEARLY RESERVED TO THE STATES.

4. The United States can exercise only the powers granted by the Constitution. All powers not so granted are reserved to the States or people, which reservation of rights is expressly affirmed and emphasized by the Tenth Amendment. The Constitution provides for a system of dual sovereignty. Each citizen is a citizen of the United States, owing it allegiance in respect to matters which the United States is entitled to control, and a citizen of his State, owing it allegiance in respect to matters which such State is entitled to control.

It is a basic principle of the Constitution that the United States shall be protected in the exercise of its granted powers and the States equally protected in the exercise of the powers confided and reserved to them, and that the rights of neither shall be impaired. Any action by either which impairs or destroys the rights of the other is repugnant to the Constitution and unlawful. If an apparent conflict arises between the powers granted the United States and the powers reserved to the States, it has been held that neither should be so interpreted or enforced as to "nullify or substantially impair the other".

CONTROL OF AGRICULTURE IS RESERVED TO THE STATES.

5. The control of agriculture is admittedly reserved to the States. The States have the right and duty to control it in so far as it can constitutionally be controlled.

The States have exercised their right of control. The Constitutions, laws or public policy of all the states forbid such a combination as the present to restrict agriculture in order to enhance prices.

CONTENTIONS OF THE GOVERNMENT.

6. The United States claims the right to enact the present scheme of regulation on the following grounds:

A. It contends that though Congress has no right to control or legislate with respect to agriculture, it has the right under Article I, Section 8, of the Constitution, "to levy . . . taxes . . . to . . . provide for the general welfare of the United States", and that this so-called "welfare clause" gives it the right to levy taxes and appropriate the proceeds not only for matters in respect to which it can legislate, but in respect to all matters which it determines are for the general welfare of the United States. It contends that it can exercise this power of appropriation to pay money to those who conform to its wishes, and thus regulate agriculture not by direct legislation, but by granting or refusing benefits, and in this manner can lawfully put into effect the present plan, the direct purpose of which is to limit the production of agricultural products within the States and under which practically all the farmers of the country growing basic commodities have entered into a combination drastically to limit their production.

B. The Government further contends that the banks organized by it have the right to loan money on mortgages to the farmers; that these banks hold some 18% of all farm mortgages; that the Government, having created these banks, may preserve them, and in order that they may be able to collect on their mortgages, the United States may regulate not only the particular mortgages

which they hold or the business of these particular mortgagors, but the entire agricultural industry.

OUR CONTENTIONS.

7. We contend:—

A. That the Madisonian interpretation of the welfare clause is the proper interpretation, viz.: that by the "general welfare of the United States" is meant those matters in respect to which the United States is authorized to act and with which it is concerned, and that under this interpretation, since the United States is not authorized to legislate or deal with agriculture, it is not within the "general welfare of the United States" and Congress, therefore, cannot levy taxes for the purpose of any such plan as the present concerned with agriculture.

B. That if the broader Hamiltonian interpretation of the welfare clause is adopted, and Congress can levy taxes to carry out its granted powers and also appropriate tax money for other purposes in respect to which it cannot legislate or which it can not regulate, nevertheless, Congress can not use this mere right to appropriate, as in the present case, to bring about the regulation of agriculture which, by the express terms of the Constitution, it is forbidden to regulate.

C. That the right of Congress to authorize the creation of banks which can make agricultural loans, and loans to industry, does not empower it to regulate all agriculture or all industry.

D. That the taxes imposed on cotton manufacturers to be paid to cotton growers not to induce them to perform a service to the public, but for their own benefit, violate the due process of law provision of the Fifth Amendment.

MADISONIAN INTERPRETATION OF THE WELFARE LAUSE IS CORRECT.

8. We submit that the Madisonian interpretation of ne welfare clause which permits Congress to tax only or the purpose of carrying out its granted powers is correct.

If we look only at the Constitution, this is the fair meaning of the words themselves. The United States was organized, as the Preamble of the Constitution provides, among other things, "to promote the general welfare." t must be presumed that all powers were granted the Jnited States which it was deemed necessary it should xercise in order to provide for the national general welare which it was the purpose of the Constitution to promote. The responsibility for the general welfare in relaion to other matters was confided to the States. The Jnited States is concerned with the general welfare relating to matters confided to it; the States are concerned vith the general welfare in respect to matters for which hey are responsible and for which they have a duty to rovide. The right to tax would naturally be given to the Jnited States to enable it to carry out matters for which t was responsible. It would be unnatural to give it power o tax for the purpose of applying the proceeds to matters in respect to which the States have the right and duty o provide and for which they have power to tax. The Jnited States has power to tax to pay the debts of the Jnited States, to provide for the common defense of the Jnited States, and the general welfare of the United States. This general welfare is clearly the general welare in respect to matters for which it is responsible and ot the general welfare for which the States are responible.

This view is confirmed by extemporaneous circumstances. The original taxing provision as adopted by the

Constitutional Convention merely gave power to lay taxes. This would clearly have limited the United States to taxing in order to carry out its powers granted to it. It is clear that the words "to pay the debts and to provide for the common defence and general welfare of the United States" were added solely for the purpose of emphasizing the right of the United States to tax for the purpose of paying the obligations of the United States under the Articles of Confederation, which by the express terms of the Articles of Confederation, included the debts of the States incurred "for the common defence and general welfare." In other words, under the Articles of Confederation the debts incurred by the States for Federal purposes were to be repaid them by the United States. Sherman, who originally suggested these words, and the Committee which adopted and proposed the final wording of the taxing clause, clearly had no idea that they could be construed as giving the vast power now claimed. They were adopted without debate, although the Committee which recommended them and the Convention which adopted them without debate had many members such as Madison, Williamson, and others who strongly opposed the Hamiltonian interpretation and, like Madison, insisted that it had never even been suggested until after the adoption of the Constitution that the phrase could be so construed. The Hamiltonian construction was not suggested in the *Federalist* or by any responsible person in any of the discussions preceding the adoption of the Constitution. It was not thought of until advanced by Hamilton, as Secretary of the Treasury, for the purpose of giving the United States greater power in conformity with Hamilton's views of what the Constitution should have provided and not in accordance with what it did provide.

Contrary to the often expressed opinion, Hamilton's view was bitterly opposed in the early Congresses, and there is not a clear-cut instance of its acceptance in legislation until after the Civil War, and it is only comparatively recently that it has been acted upon except in sporadic instances.

HAMILTONIAN INTERPRETATION OF WELFARE CLAUSE.

9. If the Hamiltonian interpretation is adopted, it does not authorize the present legislation.

Hamilton admitted that the right to appropriate for objects other than the powers granted the United States does not give Congress the power to control or legislate with respect to such objects. Otherwise, the United States would have unlimited powers, since all that would be necessary to enable it to control a subject matter would be to appropriate money towards it and then legislate in respect to such subject matter and thus control it.

It is clear, then, that if the Hamiltonian interpretation is accepted and the United States has the right to appropriate for objects beyond its granted powers, the United States is not authorized to control such objects. The government's sole right under this doctrine is to apply money to agriculture—not to control it.

Under the Hamiltonian doctrine, the United States remains a government of strictly limited powers. It admittedly has no power to regulate agriculture; the power to regulate agriculture is admittedly reserved to the States by the Tenth Amendment.

The right to tax under the Hamiltonian interpretation restricts the purposes for which the tax may be levied; it must be levied to pay the debts of the United States, to provide for the common defense of the United States, or to provide for the general welfare of the United States.

The Government admits that the right to tax and appropriate the proceeds for the general welfare has limitations. Thus, it admits that the tax can only be levied for purposes which are general, as distinct from local, national, as distinct from State. (Brief, p. 138.) We submit that this right is necessarily subject to a further limitation. The right to appropriate can not be exercised for unlawful purposes, including purposes repugnant to the express terms of the Constitution itself.

The Constitution provides that the States shall have the exclusive right to regulate agriculture. Taxes levied by Congress for the express purpose of being appropriated in such manner that they necessarily regulate agriculture on a vast scale and for the express purpose of so regulating it, are levied and appropriated for the express purpose of accomplishing an object wholly repugnant to and forbidden by the Constitution.

The mere right to appropriate or apply money to a purpose can not be so construed or exercised as to permit Congress to exert a regulation over local affairs which the Constitution expressly denies Congress the right to regulate. Otherwise, we reach the absurd result that the express intent of the Constitution to confide the regulation of agriculture and other local matters to the States can be nullified by the simple expedient of appropriating money for such matters on conditions which bring about the regulation which the Constitution forbade Congress to impose. There are few schemes of regulation of local matters which Congress could not effect by laying down a scheme and paying benefits to those who conform.

If this principle is established, then, for practical purposes, the principle that the United States is a government of enumerated powers only, the regulation of other matters being left to the States, can be completely nullified. The right to appropriate money would, for prac-

tical purposes, be given the same effect as though the right were expressly granted to the United States to control to such extent as from time to time it saw fit, all local matters. The Constitution would be construed as giving the United States power to completely defeat its express purposes and intent.

We submit that the right to tax and appropriate the proceeds for the general welfare of the United States can be given no such interpretation. Legislation directly intended and having the direct result of regulating agriculture or other local matters violates the purpose, intent, and express provisions of the Constitution, and is unconstitutional and, therefore, unlawful. A tax levied in order to appropriate the proceeds for the purpose of defeating the intent and express provisions of the Constitution can not be deemed for the "general welfare of the United States."

The United States contends that the combination authorized in the present case between the Secretary of Agriculture and the farmers to limit production is voluntary, and therefore lawful. A combination or conspiracy to restrain trade or limit production is not made lawful because voluntarily entered into by the individuals who are parties to it. Practically every combination to restrain trade or limit production is voluntary on the part of the members, but it is well recognized that this constitutes no defense. An unlawful regulation either of interstate commerce or intrastate commerce or production can not be converted into a lawful combination because the members of the combination act voluntarily.

Furthermore, the combination in the present case is not voluntary. The benefits are devised to make it necessary on the part of the farmers to join, as a practical matter. As this court has held, action so induced is induced by coercion.

The principle that a sovereignty can not induce action which is beyond its jurisdiction to control by granting a benefit to those who conform and denying it to those who refuse to conform has been recognized in a large number of cases in this court, such as the Child Labor cases, *Hill* v. *Wallace*, and numerous cases holding unlawful a grant by a State of a permit to do business to a foreign corporation which conforms to the wishes of the State in respect to a matter beyond its jurisdiction, and the refusal of such permit when the foreign corporation declines to conform. The principle of these cases is clearly applicable in the present case.

The right to appropriate, which admittedly gives no right to control, can not be used for the direct purpose of thus controlling matters beyond the jurisdiction of the States. If so, the basic principle of the Constitution—the division of authority between the United States and the States—will be destroyed.

THIS LEGISLATION IS NOT JUSTIFIED AS A MEANS OF CARRYING OUT THE FISCAL POLICIES OF THE UNITED STATES.

10. The contention that the United States can directly regulate agriculture, in order to enable the Federal Land Banks, Joint Stock Land Banks, and other similar agencies of the United States, to collect the farm mortgages which they hold, requires little discussion.

If this contention is correct, it means that the United States, in order to enable the national banks to collect on their loans, which have been made to practically every industry in the country, can regulate all industry and thus destroy the entire basis on which the Constitution is founded.

THE PROCESSING TAXES VIOLATE DUE PROCESS OF LAW.

11. The taxes in the present case also violate the due process clause of the Fifth Amendment.

They are levied on cotton manufacturers and the proceeds paid to farmers who reduce their production of cotton. The purpose is to enable cotton growers to receive higher prices for the cotton they do produce, and thus, by reason of these higher prices received for their products and the receipt of the benefit payments, to obtain a fair share of the national income.

It is to be noted that the Act does not provide for taxing the income of cotton manufacturers and distributing it to farmers to enable the farmers to increase their incomes, and thus to equalize incomes. Cotton manufacturers must pay the tax, whether or not they make a profit or a loss. As a matter of fact, a large portion of the cotton textile manufacturers have not had any income but have suffered only losses since the Agricultural Adjustment Act was enacted.

Payments are not made to farmers because of their poverty. The richest man in the country, if a cotton grower, is urged and has the right to receive the benefit.

The important fact to bear in mind, however, is that these benefits are not paid to cotton growers to induce them to render a service to the public. On the contrary, they are required by the plan to reduce their crops, thereby necessarily discharging farm laborers and furnishing less cotton to the public at higher prices.

The only contention made by the Government that the public receives a benefit is the contention that the cotton growers, by reason of these benefit payments and increased prices, will have more money to buy manufactured goods and thus will indirectly benefit manufacturers and their employees. It is somewhat difficult to see why, if this money were not taken from the cotton manufac-

turers, they and their stockholders (in the case of a corporation) would not equally be in a position to spend more money and thus equally benefit manufacturers and their employees.

Disregarding this, however, the contention of the Government merely means that if money is taken from one class and given to another class, this other class will probably spend it. This is simply and solely a redistribution of wealth by government decree. It is clearly arbitrary and capricious and violates the due process of law provision of the Fifth Amendment.

II.

ANALYSIS OF THE AGRICULTURAL ADJUSTMENT ACT.

A. PROVISIONS OF THE ACT.

The provisions of the Agricultural Adjustment Act which are pertinent to this discussion may be briefly summarized as follows:

The Act contains a preamble entitled "Declaration of Emergency" setting forth that the disparity between prices of agricultural commodities and other commodities has broken down the orderly exchange of commodities and seriously impaired the agricultural assets supporting the national credit structure, and it is declared that these conditions have affected transactions in agricultural commodities with a national public interest and have obstructed the normal currents of commerce in such commodities.

The Act authorizes the Secretary of Agriculture to provide for reduction in acreage and production for market of any basic agricultural commodity, "through agreements with producers or other voluntary methods," and to provide "for rental or benefit payments in connection" therewith. (Sec. 8 (2).) Basic commodities are defined in Section 11 to include cotton, wheat, rye, flax, barley, field-corn, grain, grain sorghums, hogs, cattle, rice, tobacco, sugar beets and sugar cane, peanuts, and milk and its products, and potatoes. A few of these commodities have been added by amendments since the passage of the original Act. Upon the determination and proclamation of the Secretary of Agriculture that rental or benefit payments are to be made with respect to any basic commodity, a processing tax is to go into effect at the beginning of the next marketing year on the domestic

processing of such commodity. (Sec. 9 (a).) The rate of the tax is to be determined by the Secretary so as to make it equivalent to the decline in purchasing power of the basic commodity from the base period, which in the case of cotton is defined as the period, August 1909 to July 1914. (Sec. 2.) Provision is made for adjustments by the Secretary of the rate under certain circumstances.

The processing tax in respect to any commodity is to terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity.

Section 12 appropriates the proceeds of the processing taxes to the payment of rentals and benefits.

The Secretary of Agriculture is also authorized to give producers of cotton, options to purchase cotton owned by the United States to an amount not in excess of the reduction in the production of cotton which may be made by such producer below the amount produced by him in the preceding year, but in all cases where such options are given the producer must agree in writing to reduce the amount of cotton produced by him in 1933 below his production for the previous year by not less than 30 per cent, and without any increase in commercial fertilization per acre; and he must further agree not to use the land taken out of cotton production for the production for sale of any other nationally produced agricultural commodity. (Sec. 6.)

The Secretary of Agriculture is authorized with the approval of the President, to make such regulations with the force of law as may be necessary to carry out the powers vested in him. (Sec. 10 (c) (d).)

The powers given the Secretary of Agriculture to make agreements for the reduction of crops and to make such

rental and benefit payments on account thereof are given him for the purpose of enabling him "to effectuate the declared policy" of the Act (Sec. 8), which declared policy is set forth in Section 2.

The declared policy is to re-establish prices to farmers which will give agricultural commodities a purchasing power with respect to articles farmers buy, equivalent to the purchasing power of such agricultural commodities in the period August 1909 to July 1914, except in the case of tobacco for which the period is August 1919 to July 1929.

The Act has been amended by Section 35 of the Public Acts No. 320, 74th Congress, affirmed August 24, 1935, but these amendments enacted after the imposition of the taxes involved in this case are not pertinent to the discussion contained in this brief.

B. PURPOSES OF THE ACT.

DIRECT PURPOSE.

The direct and immediate purpose of the Act is to reduce production of agricultural commodities in order to raise the prices received by farmers for these commodities. This is to be accomplished by levying a tax on domestic processors of these commodities to be paid to farmers who agree to reduce their crops.

OTHER PURPOSES.

The Act sets forth a declaration of emergency and a declaration of policies which are, at first sight, somewhat confusing. Stripped of verbiage, the Act is based upon the following economic theories and intended to accomplish the following direct as well as ultimate purposes. These theories and purposes are apparent upon a careful reading of the Act, and are set forth in chapter 1 of the "Report of the Administration of the Agricul-

tural Adjustment Act," (hereinafter referred to as "Report") the first subsection of which is entitled, "Why the Act Was Passed". Other facts on which the government rests its economic theories are set forth in a pamphlet entitled, *Economic Bases for the Agricultural Adjustment Act,* published in 1933 by the Department of Agriculture.

For some time prior to 1929, it is contended that farm products could be exchanged for relatively less industrial goods than in the four years preceding the War.

> "Even at the crest of the business cycle in 1929, farm products could be exchanged for only 91 per cent as much of other products, on the average, as they could be exchanged for in the period before the war." (Report p. 1.)

By this it is not meant that in 1929 farmers obtained less in exchanging their products than they did in the pre-war period. The total national income rose greatly and the farmers shared in this increase. The contention merely is that they did not get their fair percentage or proportion of the increase.

> "Between 1921 and 1925 farmers shared in the rise in national income, but that share [of the total] was less than before the war." (*Economic Bases for the Agricultural Adjustment Act,* p. 6.)

When the depression came, this so-called disparity, it is contended, increased. "By February, 1933, the exchange value of farm products for industrial goods had fallen to 50 per cent of the pre-war average." (Report p. 1.)

The reason for this reduction in prices for farm products was the usual one which affects prices; namely, supply and demand. "The immediate cause of this disparity was the pressure of surpluses of farm products

on the markets." (Report p. 1.) ". . . a surplus is a quantity so abundant as to depress prices below a figure which will adequately reward the producer. . . . A surplus always means a surplus at some particular price. At a lower price the surplus is absorbed and so disappears." (Report p. 1.) In other words, supply exceeded demand at the price which the government contends gave an "adequate reward". A consequence of the failure of the farmer to receive an adequate reward was that he had less money to purchase manufactured goods. Thus manufacturers suffered due to lack of purchasing power by the farmers and employees were thrown out of work. (Report p. 3.) It was contended that if the farmers could be given a larger return this would, in the first place, help the farmers and in turn, it would enable them to purchase more manufactured goods and thus help manufacturers and their employees. It would also enable the farmers to pay interest on their mortgages and increase the value of their farm lands and thus help the banks and insurance companies holding mortgages, and, in general, assist in the return to prosperity.

Merely to increase prices to the farmer sufficiently to give him an "adequate return" would result in increased production, increased surpluses and, therefore, would result in an increased burden on the government to maintain prices at a level in excess of prices determined by the normal operation of demand and supply. (Report p. 5.) It was, therefore, deemed necessary not only to provide that the farmer receive an adequate price, but also to cut down production so that the supply would not tend to keep prices at less than an "adequate price"; in other words, to adjust supply and demand on a level which would keep prices at the point desired by the government.

The desired price level was not a fixed price but one which was deemed to give the farmer for the exchange of his products the same relative purchasing power which he had in the pre-war years 1909 to 1914.

> "It is because of the series of maladjustments brought about by the surplus of farm products that the Government has undertaken to control their production, bringing supplies into line with demand at a price which will afford the farmers a return commensurate with their income during the 5 pre-war years. (Report p. 3.)
>
> ". . . The evident purpose of the act is to promote the prosperity of the farmer by returning to him a fair share of the national income and to foster national recovery by making the farmer as good a customer for non agricultural industries and services as he was before the World War." (Report p. 4.)

POWERS GRANTED TO ACCOMPLISH THESE PURPOSES.

The Report refers to the two groups of powers provided for in the Act: "those dealing with production control and those dealing with marketing agreements and licenses". (Report p. 5.)

The first group of powers provides for reducing production and thus supply.

> "Authority granted for this purpose recognizes the existence of overproduction and of a burdensome surplus of many farm products; it recognizes the necessity of reducing this oversupply and refraining from further overproduction that maintains and adds to it if the farmer is to receive his fair share of the national income. . . . It provides a method of giving financial assistance through benefit payments to farmers who, voluntarily and not otherwise, cooperate with the government in making the necessary adjustment." (Report p. 5.)

The other group of powers authorizes the Secretary of Agriculture to control marketing and thus to assist him to restore parity prices and at the same time protect the consumer. (Report p. 6.)

> "The powers conferred by the Agricultural Adjustment Act, then, are directed towards economically balanced production of agricultural commodities on the one hand, looking toward a fairer share of the national income for farmers, and, on the other hand, a system of distributing farm products that will be economically sound." (Report p. 7.)

The processing taxes on any commodity so far as possible "are used for benefit payments to the producers of that particular commodity." (Report p. 10.)

> " . . . the processing tax is the heart of the law. The processing tax is a means of raising revenue for accomplishing one or both of two things intended to help farmers attain parity prices and purchasing power." (Report p. 9.)

These two purposes for which the processing tax are levied are as follows:

First. To bring about a reduction in production.

Voluntary efforts of producers to bring about a reduction of crops inevitably comes to naught by reason of the fact that a minority will not cooperate. (Report p. 9.)

> "It is to keep this noncooperating minority in line, or at least prevent it from doing harm to the majority, that the power of the Government has been marshalled behind the adjustment programs." (Report p. 9.)

Second. The processing taxes constitute a direct payment of so much cash to the farmers thus adding to their income. "The second way in which the processing tax

and benefit plan helps farmers is in making a direct contribution to their income." (Report p. 10.) Thus

"by establishing the parity principle for agriculture, Congress, in the Agricultural Adjustment Act, recognized a fundamental concept of the national recovery program, which is that those large economic groups performing essential functions for society must have a fair share in the national income". (Report p. 10.)

SUMMARY OF PURPOSES.

In other words, this legislation is intended to provide that the farmers shall receive for their products a "fair share of the national income". It authorizes the Secretary of Agriculture to endeavor to accomplish this purpose, first, by a vast combination between himself and the producers of each basic commodity under which the farmers will agree to reduce their production in consideration of the money to be paid them, and those not willing to cooperate will be kept "in line" and made to do so by the inducement or economic necessity of obtaining benefits; and second, by direct payments of cash to the farmers thus increasing their income. The processing tax on each commodity is levied to provide the funds to enable the Secretary to carry out the scheme with respect to that commodity.

The public, it is contended, will be benefited by this increased prosperity and additional purchasing power.

QUESTIONS RAISED.

Two questions are at once raised.

First. Is not the control of agriculture exclusively confined to the States and if so, can Congress constitutionally authorize this plan to control it?

Second. Can Congress levy a tax on processors for the purpose of paying the proceeds to farmers not selected as objects of charity because of poverty, but because it is believed that the transfer of this wealth or purchasing power from the processors to the farmers is required to give them a fair share in the national income and because it is believed that this redistribution of wealth or purchasing power will enhance prosperity or aid in recovery?

The question to be decided in the present case is not whether the plan is economically sound but whether the Constitution confers upon Congress the power to authorize it.*

> "The recuperative efforts of the government must be made in the manner consistent with the authority granted by the Constitution." (*Schechter* v. *United States, supra.*)

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*NOTE. While we do not consider it material there is grave doubt as to the soundness of the economic theory upon which the Agricultural Adjustment Act is based.

1. It is questionable whether the alleged disparity existed. Prices for farm products in the depression undoubtedly fell more than prices for manufactured goods. This was, however, due to larger fixed charges on industry. Manufacturers were for the most part suffering large losses in 1932. Wages were reduced; many employees were out of work or on reduced time. The purchasing power of the manufacturers and their employees was greatly reduced and we doubt if it could be proved that the farmer's purchasing power was reduced in larger proportion. The industrial workers and employers with reduced wages or profits, or none at all, were also buying industrial products at the same prices which farmers paid. The truth is that the national income was reduced by about one-half and the farmer's share was, of course, largely reduced. It would be difficult to prove that the farmer suffered more than other classes.

2. The cost or effort involved in producing farm products has decreased considerably since 1914 due to improvements in farm machinery and methods. If the cost of production of industrial products had remained stable, a bushel of wheat would cost less effort and money to produce and ought to buy less of other products. The question of whether a change in purchasing power of farm products was just, must depend upon relative

decreases in costs or effort required to produce farm products as compared with industrial products.

3. It is impossible to compare the purchasing power or exchange value of agricultural products in 1933 with their purchasing power in the pre-war period. The farmer does not today buy the same products. He now purchases many things not even invented prior to the War, such as radios. Farm machinery, automobiles, and most other products have so changed in character that the combination of articles the farmer may now buy can not be compared with what he bought twenty years ago. Robertson, D. H., *Money*, p. 27) says that the things purchased by the working man change in character so rapidly that "by about 1950, for instance, it may be scarcely more interesting to know the price of the combination of things consumed by the working-class family in 1914 than to know what the price would be in England of the combination of things habitually consumed by Chinamen".

4. There is no particular reason why the years just preceding the War should be taken as a standard of exchange value to which farmers are entitled. The world is not static. "The tendency still persists in economic matters to attribute a peculiar sanctity to the year 1914; all sorts of people who were very discontented at the time tend to look back to it now as having been in some sense the 'normal' or standard year for all time." Robertson, D. H. (*Money*, p. 26.) "Under the changed conditions of technical efficiency in industry and agriculture and with the new standards of personal needs and tastes, the restoration, for example, of the old price relations would require a distribution of the national income absolutely different from what it was twenty-five years ago." (*Economics of the Recovery Program*, p. 157.)

5. The transfer by means of taxation and benefit payments of money purchasing power from processors or the general public to the farmers "does no more than exploit one class at the expense of another, unless it is accomplished by an increase in 'goods', 'purchasing power', or production." (*Economics of the Recovery Program*, p. 24.) In other words, unless the transfer of money from processors to farmers, increases the amount of commodities produced and therefore the national income, it merely benefits one class at the expense of the other. Here we have not an increase but a reduction of production expressly sought. Mere transfer of purchasing power from one class to another can not increase prosperity; the total purchasing power is not thereby increased; nor is it an aid to recovery. The problem of recovery is to increase the production and use of goods by all classes.

When the transfer of property from one class to another is accompanied, as in the present case, by a reduction in production resulting in an enormous decrease in the employment of farm laborers, great losses suffered by ranchmen and dairymen due to the scarcity and high price of cottonseed cake and meal resulting from the reduction in production of 3,500,000 tons of cottonseed (See Article by A. B. Cox referred to below),

and increased prices of agricultural commodities to the public, it may well be doubted if it aids recovery.

6. It is very doubtful if the plan even aids the cotton growers for whose direct benefit it is enacted. There has been a decreased use of cotton in the United States of 329,000 bales in the year 1934-1935 over the previous year, although other businesses have increased production. Cotton production outside the United States for the past year was over 2,500,000 bales larger than for 1932-1933, and over 2,000,000 bales more than the five-year pre-depression average. In other words, foreign production is making up for our restriction, and as over half our cotton must be sold abroad, and it is sold at world prices, we are apparently to lose our market by the amount we reduce production, so that we can not regain it except by drastic reductions in price. By selling more cotton at a lower price, cotton growers would be as well off, and would retain their foreign markets. (See *The Cotton Situation Approaches a Crisis*, A. B. Cox, Director, Bureau of Business Research, University of Texas.)

III.

THIS LEGISLATION AUTHORIZED A DRASTIC REGULATION OF AGRICULTURE.

A. THE ACT AUTHORIZED A GIGANTIC COMBINATION TO RESTRICT PRODUCTION IN ORDER TO ENHANCE PRICES.

The Agricultural Adjustment Act obviously contemplates and authorizes the Secretary of Agriculture to create an immense and far-reaching combination to restrict the production of agricultural products for the purpose of raising prices. No such gigantic scheme has ever been undertaken in this or any other country. If undertaken by individuals, it would, of course, be characterized as an unlawful conspiracy to restrict production and enhance prices. Unless the United States has been empowered by the Constitution to authorize this combination, it must be characterized in the present case in the same manner.

An unconstitutional act is no act at all and gives no authority. "It is, in legal contemplation, as inoperative as though it had never been passed", (*Norton* v. *Shelby County,* 118 U. S. 425, 442).

The Secretary of Agriculture, therefore, when acting under unconstitutional legislation has only such rights as he may exercise in his individual capacity. If the plan carried into effect by him as an individual would be an unlawful conspiracy, it remains an unlawful conspiracy unless he can show the United States was granted by the Constitution power to authorize it.

That the Agricultural Adjustment Act contemplated this vast combination and no minor undertaking which might have no substantial consequences is self-evident from the objectives of the legislation, the purposes of

which were to rid the country of an immense surplus of basic agricultural products and to reduce the supply so that the prices for these basic agricultural products would be increased between fifty and one hundred per cent. These results could not be accomplished except by a far-reaching scheme which was to be adopted and entered into by the Secretary of Agriculture with the large majority of, if not practically all, the farmers growing these basic products. What the Secretary has done under the Act is obviously in accordance with what was contemplated and authorized and what was necessary to carry out the purpose and intent of the Act.

B. THE CARRYING OUT OF THE ACT HAS RESULTED IN A DRASTIC REGULATION OF AGRICULTURE.

(1) EXECUTION OF THE SCHEME OF REGULATION FOR 1933 IN RESPECT TO COTTON.

The Secretary of Agriculture, upon the passage of the Act, took immediate action. He determined that benefits should be paid to cotton growers and with the approval of the President, he adopted Cotton Regulations, Series 2, providing that the first cotton marketing year should begin August 1, 1933, and that the processing tax should be in effect from that date at the rate of 4.2 cents per pound of cotton processed. He also determined to make certain cash payments to cotton growers who conformed to the plan of restriction and as an alternative, in lieu of a portion of the cash payments, offered them options on cotton held by the government.

In accordance therewith he promulgated the terms of the benefit payments and options which were offered by the government and the reduction in acreage and other conditions to which the cotton farmer accepting the benefits was required to agree.

The Report of the administration of the Agricultural Adjustment Act, entitled "Agricultural Adjustment" sets forth the scheme adopted and carried out.

The Secretary determined that there were approximately 40,929,000 acres in cotton cultivation on July 1, 1933. He determined that the minimum objective for 1933 must be the elimination of 10,000,000 acres. Since the year's crop was already planted, he determined this amount of planted cotton must be plowed up and destroyed. He determined that $110,000,000 in addition to options on cotton owned by the government should be paid cotton growers to induce or compel them to agree to destroy these plantings. (Report p. 23.) He estimated that the processing taxes for the year would be $116,000,000 (Report pp. 28 and 29). The contracts offered the cotton growers for the year therefore provided (1) that each cotton grower should take out of production, that is plow up, the cotton then growing on a specified number of acres of his land; (2) that he would not use on his remaining crops any more fertilizer than was used in 1932; (3) that the Secretary should have authority to destroy the crops on the specified acres if the cotton grower failed to do so; (4) the farmer, in consideration of his agreement, was to receive a specified cash payment per acre or, at his option, a lesser amount of cash and an option on certain government owned cotton.

By regulations having under the Act the force of law, it was provided that all producers of cotton who had agreed to reduce the amount of their cotton should plow under the same on or before September 18, 1933; and if they failed to do so, any person authorized by the Secretary was empowered to enter and take action to that end, the cost to be borne by the producer. (Cotton Regulations, Series 1, Supplement 1, approved September 18, 1933.)

A vast campaign was inaugurated to induce farmers to contract which, outside Washington, cost $2,799,000 (Report p. 28). In this campaign 2,200 county agents constituted the "shock troops" "out on the firing line" (Report p. 27). In the 956 counties in which contracts were made there were approximately 22,000 local workers. In many cases, schools of instruction were held before these workers entered into the campaign (Report p. 27). News releases were sent to 664 dailies and 3,500 weekly papers, and special articles were prepared for the farm magazines (Report p. 27). As a result of the campaign, 1,026,514 different contracts were entered into and 10,400,000 acres of growing cotton were plowed up and the production of cotton reduced by 4,400,000 bales, which is about 80% of the amount used domestically in the United States. (Report p. 28.)

(2) EXECUTION OF THE SCHEMES OF REGULATION OF 1934 AND 1935 WITH RESPECT TO COTTON.

The program for 1934 contemplated a reduction in cotton acreage of 40% from the 1928-1932 average acreage, making it possible in 1935 to have a reduction of 25% (Report p. 38). Benefit payments of 3½ cents per pound for the cotton so not to be grown, plus not less than one cent per pound on each processor's share of the cotton domestically consumed, were to be paid (Report p. 39). It was planned that 15,000,000 acres should be eliminated from cultivation (Report p. 39).

The contract for 1934 contained the following terms (Report pp. 331, 332):

> "The Producer shall—
>
> (1) Reduce the acreage to be planted to cotton in 1934 on this farm by not less than thirty-five percent (35%) and not more than forty-five percent (45%) below the base acreage; provided, however, that the

total reduction of all producers offering to enter into 1934-1935 Cotton Acreage Reduction Contracts within the above named county or parish shall not exceed forty percent (40%) of the total base acreage of such producers.

(2) Not grow cotton during 1934 and 1935 on land owned, operated, or controlled by him unless such land is covered by a 1934 and 1935 Cotton Acreage Reduction Contract, except as provided in regulations or administrative rulings.

(4) Not increase on this farm in 1934 above 1932 or 1933 (a) total acreage planted to crops including the rented acres; (b) the acreage planted to each crop for sale, designated in the Act as a basic commodity, except as may be permitted under the contract between the producer and the Secretary; (c) the number and kind of livestock designated as a basic commodity in the Act (or a product of which is designated) kept for sale (or the sale of a product thereof).

(5) Use the rented acres only for: soil-improving crops; erosion preventing crops; food crops for consumption by the producer on this farm; feed crops for the production of livestock or livestock products for consumption or use by the producer on this farm; or fallowing; or such other uses as may be permitted by the Secretary or his authorized agent.

(9) Comply with the terms hereof and of all regulations or administrative rulings which have been given or may hereafter be prescribed by the Secretary with reference to 1934 and 1935 Cotton Acreage Reduction Contracts, and any violation of said terms, regulations, rulings, or any material misstatement herein, or in any information furnished by the producer, shall be grounds for the cancellation of this

contract by the Secretary. In the event of such cancellation, the producer shall repay to the Secretary any sums theretofore paid hereunder to the producer. The determination of the Secretary that any such violation or misstatement has occurred shall be final and conclusive."

(3) EXECUTION OF SCHEMES OF REGULATION WITH RESPECT TO OTHER CROPS.

We have not space to detail the contracts entered into in respect to other agricultural products.

In respect to wheat, the plan contemplated contracts with 550,000 growers, the removal of 7,595,000 acres from cultivation, and payments to farmers of $95,000,000 in benefits (Report p. 43). In respect to tobacco, approximately 275,000 government signed contracts were entered into with growers who agreed to drastically reduce their crops (Report p. 69). In respect to corn and pigs, $350,000,000 was contemplated for benefit payments. Approximately 1,500,000 farmers were asked to sign contracts and a reduction of 25% was required in respect to hogs and 20% in respect to corn (Report p. 69).

(4) OTHER MEASURES INITIATED SHOW INTENTION TO EFFECT CONTROL.

Other means to assist the plan were undertaken by the government.

As respects cotton, the government sponsored a cotton growers marketing agreement under which no new gin could be established or old gin eliminated without the Secretary's consent, and under which maximum rates for ginning were fixed (Rep. p. 40). In addition, in order to bring into the plan those who could not be made to enter under the authority of the Agricultural Adjustment Plan, the government passed the Bankhead Cotton Control Act and the Kerr Tobacco Control Act (48 Stat.

598, Approved April 21, 1934, and 48 Stat. 1275, Approved June 28, 1934, respectively). The Bankhead Act provides for a tax of 50% of the average central market price per pound of lint cotton but in no event less than five cents per pound on the ginning of cotton which is in excess of 10,000,000 bales for the crop year of 1934-1935. Farmers who grow within the amount allotted to them by the Secretary of Agriculture are exempt from the tax. The Kerr Tobacco Act provides a drastic tax on tobacco for those producing in excess of their allotments.

C. THE REGULATION ACHIEVED AND THE REDUCTION OF PRODUCTION HAVE PRODUCED RADICAL EFFECTS ON THE INTERNAL ECONOMY OF THE STATES.

It needs no extended statement to show the enormous extent to which these plans and regulations affect the internal economy of the States. The question is not whether these plans are economically sound and beneficial. The question is, to what extent they regulate, control, and intermeddle with agriculture, a matter exclusively within the jurisdiction of the States.

As respects cotton, 15,000,000 acres or 40% of cotton producing land was made idle for the 1934 crop. The prosperity of many of the States is largely dependent on their cotton crops. At even $30 an acre, $450,000,000 of taxable land was made idle. The number of farm hands, croppers, etc., required to plant and harvest these crops who, in consequence, are thrown out of employment alone presents a serious problem. In States producing cotton and also having cotton mills, the supply of cotton has been decreased and the cost greatly increased, which may cause serious effects on the operation of the mills and upon the demand for labor. In respect to other crops, the effect is equally great.

That this effect upon the States deeply concerns them can not be questioned.

In *Wyoming* v. *Colorado,* 286 U. S. 494, 502, where suit was brought by the State of Wyoming against the State of Colorado with reference to diversion of irrigation water, in which case objection was made that the rights of individuals only were concerned, the Court said:

> "As respects Wyoming the welfare, prosperity and happiness of the people of the larger part of the Laramie valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that State. Thus the interests of the State are indissolubly linked with the rights of the appropriators."

IV.

IF THIS LEGISLATION IS CONSTITUTIONAL, IT NECESSARILY FOLLOWS THAT CONGRESS HAS AN ALMOST UNLIMITED POWER TO IMPAIR THE CONTROL BY THE STATES OVER THEIR INTERNAL AFFAIRS.

It is clear that Congress can not directly regulate or control agriculture, manufacturing, or any of the other internal affairs of the States and that for Congress to do so would violate the Constitution in a two-fold sense: *first,* because Congress would exercise a power not conferred upon it; and *second,* because such action would intermeddle and interfere with matters, jurisdiction of which is expressly reserved to the States.

Yet if Congress can constitutionally authorize the present scheme, it follows that it has practically unlimited power to intermeddle with and control matters which the Constitution intended should be exclusively controlled by the States.

Under the present legislation, Congress does not directly prohibit. It controls by offering inducements in the shape of benefit payments to those who conform to its scheme. When the power to confer financial benefits on those who conform to the wishes of the donor of the benefits is backed by the unlimited taxing power of the United States, there is little limit to the extent of the regulation and control which can be effected. In cases where Congress really desires to control, it is as effective a means as the power to prohibit.

If the United States by this means can carry through the present gigantic scheme of regulation and restriction, it is clear that it can put into effect any Congressional policy, no matter how much it may interfere with the

internal economy of the States, by merely paying enough to see that such policy is carried out. There are few things which men would be unwilling to do in the way of conforming to Congressional policies, and few things which, therefore, could not be accomplished, were sufficient inducement offered.

It would be no defense to such interference with State matters that the action was voluntary, but it can not be called voluntary in any real sense. Benefits in this case and in all cases can be so calculated as to compel those to whom they are offered to accept or suffer serious economic consequences,—the destruction of their business and the loss of their livelihood. **The power to tax is the power to destroy. The power to confer or withhold unlimited benefits is the power to coerce or destroy.**

Let us examine a few of the results which could be accomplished under this doctrine.

Clearly, the United States could bring about through this means the purposes this Court held it could not accomplish directly in the *Schechter* case (*supra*) and the *Railroad Retirement case* (55 Sup. Ct. Rep. 758); by conferring benefits on those who conformed to its wishes, it could make it impracticable not to conform.

In the field of agriculture it could proceed much further than it has attempted to proceed in this Act and accomplish a complete regimentation of farmers. Indeed, if the present scheme is regarded as successful and its legality sustained, the United States will probably do so.

In the Report of the Administration of the Agricultural Adjustment Act, May, 1933, to February, 1934, is a chapter entitled "Planning for the Future" (p. 271). It is there stated that far-reaching and fundamental production adjustment programs which already have been undertaken or are completed must be consolidated into

permanent measures. This long-term planning "means removal of large areas of sub-marginal land from production and the development of well-balanced systems of farming on the farms remaining in production".

It means, the Secretary says, the removal of the owners to other lands or industries, the determination of the amount of agricultural products required in the future, the determination of the regions most available for certain crops and livestock products, and the development of "a regionalized plan" which will employ farm labor and farm land throughout the country in what is determined to be the most suitable manner. By the use of benefit payments all of this can be accomplished by the United States Government.

The effect of such a program may well be practically to destroy the entire economy of some of our States. If the Secretary of Agriculture determines under future legislation that the land in certain States should not be cultivated as unsuitable, he can, by refusing benefits to the owners thereof, compel them to move to other States, or he can induce them so to do by the grant of benefits.

But the effect of this principle is not limited to agriculture. It can equally well be applied to manufacturing and other industries. Benefits can be paid to certain manufacturers if they will reduce production. Benefits can be paid to manufacturers to move out of one State to some other State, determined by an official in Washington to be more suited to such industry.

The agricultural South and West in control of some future Congress, for example, can adopt or authorize the adoption of a "long-time planning" for manufacturing involving a "regionalized plan." Under this it can be determined that the cotton textile manufacturing industry should be conducted only in the South, near the source of raw material. Benefits can then be paid to

New England manufacturers who move their plants South. An official in Washington can determine that shoe manufacturing is too concentrated in New England and that "long-time planning" requires the payment of benefits to manufacturers who move their plants to other districts, and the refusal of benefits to manufacturers who choose to remain in Massachusetts. These suggestions are not idle. They are not dissimilar to the Secretary of Agriculture's proposed "regionalized" plan for agriculture.

It can be determined that large units in manufacturing are uneconomical, and benefits can be paid to small manufacturers, or vice versa.

Is it too much to say that the issue in this case involves the fundamental right of the States to control their internal affairs, and the question whether or not the Constitution gives Congress power virtually to destroy this authority?

V.

THIS LEGISLATION VIOLATES THE CONSTITUTIONS OF MANY STATES, THE LAWS OF OTHERS, AND THE PUBLIC POLICIES OF ALL STATES.

The scheme authorized by this legislation and entered into by the Secretary of Agriculture for the drastic restriction of crops not only undertakes to interfere with and control a subject matter which is within the exclusive jurisdiction of the States, but it also violates the constitutions of many States, the laws of others, and the public policies, as heretofore understood, of all the States.

Thus the Constitution of Alabama, Sec. 103 (Code of Ala., 1923, Vol. 1, pp. 300-1) provides that:

> "The legislature shall provide by law for the regulation . . . of associations . . . combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, . . ."

The laws of Alabama (Code 1923, Chap. 211, S. 5212), prohibit the formation of pools or combinations to regulate the "quantity or price" of products, or to fix or limit the quantity of any article or commodity to be produced in the State.

The Constitution of Arizona of 1910 (Art. XIV, Sec. 15) provides that no association of persons, etc., "shall combine in any manner whatever to . . . limit production . . . of any product or commodity".

The Statutes of Arkansas (Chap. 124, Sec. 7368) forbid combinations "to fix or limit in this State or elsewhere the amount or quantity of any . . . commodity . . . or any article or thing whatsoever."

The Laws of Connecticut (General Statutes 1930, Sec. 6352) make it a criminal offense, punishable by fine of not more than $1000 or imprisonment for not more than five years, or both, to conspire "for the purpose of limiting or restraining production" of any necessity of life for the purpose of increasing the price thereof.

The Constitution of Idaho (Article XI, Sec. 18) prohibits corporations and associations from combining for the purpose of regulating the production of any article of commerce or of produce of the soil or of consumption by the people. By the laws of Idaho (Code 17-4013) a violation is made a criminal offense.

Iowa (Chap. 434 of Code of 1931, Sec. 9906) forbids combinations "to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State".

The Constitution of Louisiana of 1921 (Article XIX, Sec. 14) provides that it is unlawful for any persons to combine for the purpose of forcing up or down the price of any agricultural product or article of necessity for speculative purposes. The Code (Sec. 4924) forbids combinations "to limit or reduce the production or increase or reduce the price of merchandise, produce or commodities".

Maine (Revised Statutes 1930, Chap. 138, Sec. 31) makes a criminal offense the wilful destruction or permitting preventable waste in the production, etc., of the necessities of life, which necessities include food for human consumption.

Michigan (Compiled Laws, 1929, Sec. 16647, Chap. 278, Act. 255 of 1899) forbids combinations "to limit or reduce the production" of any commodity.

In Minnesota the Constitution provides (Art. IV, Sec. 35) that "Any combination of persons . . . to monopolize the market for food products in this State or to inter-

fere with or restrict the freedom of such markets, is hereby declared to be a criminal conspiracy."

By the laws of New Mexico (Chap. 35, Article 29), every contract or combination having for its object or which shall operate to "control the quantity, price, or exchange of any article of manufacture or product of the soil or mine is hereby declared to be illegal," and any violation is made a criminal offense (New Mexico Annot. Sts. 1929).

The North Dakota Constitution (Art. VII, Sec. 146) provides that any combination between individuals having for its object the effect of controlling the price of "any product of the soil" is prohibited and declared "unlawful and against public policy."

PUBLIC POLICY OF THE STATES.

Contracts or combinations entered into for the purpose of restricting the production of any articles, especially articles of necessity such as food products, for the purpose of raising prices, have always been held illegal as contrary to public policy in all our states.

In *Standard Oil Co.* v. *United States,* 221 U. S. 1, Chief Justice White considered at length what was deemed by the common law of England and this country to constitute unlawful restraints against public policy. He analyzed the law as follows (pp. 54, 58):

> "Generalizing these considerations, the situation is this: 1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessaries of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result

from monopoly, that is an undue enhancement of price. 3. That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void."

. . . . . .

"Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions . . . of such a *character as to give rise to the inference or presumption that they had been entered into or done with the intent to . . . bring about the evils, such as enhancement of prices, which were considered to be against public policy.*" (Italics ours)

Recent cooperative marketing acts have to some extent changed the public policy of the States as respects combinations for marketing agricultural products. It is not clear to what precise extent they have changed the public policy of the States so as to authorize combinations affecting prices of articles which they sell on behalf of their members. In considering the law relating to such cooperatives it has been held in a number of cases that their purpose is to market their goods in an orderly manner and that monopoly or unreasonable enhancement of prices is not authorized or attempted or possible. It has not been held that they are authorized to restrict production and it does not appear that in any case before

the courts this has been attempted. The clear implications of the decisions are that such would not be permissible. For example, in *List* v. *Burley Tobacco Growers Cooperative Association,* 151 N.E. 471, 114 Ohio 361, the Ohio court said (p. 476)

> ". . . Nor does the evidence tend to show any agreement to limit or reduce production".

(See Edwin G. Nourse, *Legal Status of Agricultural Cooperation.*)

We submit that combinations directed to restrict production in order to enhance prices violate the constitutions, laws, or public policies of all our States.

The plan put into effect under this legislation is the most gigantic scheme to restrict production ever contemplated.

VI.

THE FOLLOWING RULES OF CONSTITUTIONAL INTERPRETATION ARE APPLICABLE IN THE PRESENT CASE.

A. NO PRESUMPTION OF ANY GRANT OF POWER TO THE UNITED STATES.

There is no presumption that any power has been granted the United States Government.

Mr. Justice Story in *Houston* v. *Moore,* 5 Wheat. 1, 48, said:

> "The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. *Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution;* and, on the other hand, we are bound to support that Constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains." (Italics supplied.)

In *Fairbank* v. *United States,* 181, U. S. 283, 289, the Court said:

> "If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; * * * it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally

> construed and that language of restriction is to be narrowly and technically construed. * * * The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

In accordance with this rule of construction the Court held a tax on a foreign bill of lading, since it resulted indirectly as a tax on exports, fell within the constitutional prohibition against a tax on exports.

The powers granted the United States and the limitations imposed by the Tenth Amendment must be given a fair interpretation in accordance with their purpose and intent.

B. A PRACTICAL CONSTRUCTION MUST BE ADOPTED WHICH PERMITS THE UNITED STATES AND THE STATES TO FUNCTION WITH THE MINIMUM OF INTERFERENCE EACH WITH THE OTHER.

A practical construction must be applied in interpreting the Constitution, which does not violate the basic principles of the Constitution or destroy or impair the powers intended to be exercised by the federal government and the states, respectively.

In *Metcalf and Eddy* v. *Mitchell,* 269 U. S. 514, involving the right of the United States to tax fees received by contractors from certain states and municipalities, the Court said that in construing the respective rights of the federal and state governments, recourse may be had to the reason for the rule which limits taxation by the respective governments, namely, "the conviction that each government, in order that it may administer its affairs, within its own sphere, must be left free from

undue interference by the other". The Court added (p. 523):

> "*But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.* Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (*South Carolina* v. *United States,* 199 U. S. 437, 461; *Flint* v. *Stone Tracy Co., supra,* at 172), or the appropriate exercise of the functions of the government affected by it. *Railroad Co.* v. *Peniston, supra,* 31." (Italics ours.)

See also *Willcuts* v. *Bunn,* 282 U. S. 216, 225.

In *Dick* v. *United States,* 208 U. S. 340, involving the question of the right of Congress to legislate against introducing intoxicating liquors into Indian country, the Court stated that there could be no "divided authority on the subject." Either the power must be in the United States or in the State. The Court further stated that in deciding the question "we are confronted by certain principles that are deemed fundamental in our governmental system" (p. 353). One principal is that a State has full control over persons and things within its jurisdiction. Another principle is that Congress has power to regulate commerce with the Indian tribes. The Court said (p. 353):

> "These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other."

C. NEITHER THE UNITED STATES NOR A STATE MAY ACCOMPLISH BY INDIRECTION WHAT IT IS NOT AUTHORIZED TO ACCOMPLISH DIRECTLY.

In *M'Culloch* v. *Maryland,* 4 Wheat. 317, 423, Chief Justice Marshall said:

> "* * * * * * * * Should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such decision come before it, to say that such an act was not the law of the land."

In *Linder* v. *United States,* 268 U. S. 5, 17, the Court said:

> "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

In *Fairbank* v. *United States,* 181 U. S. 283, a stamp tax imposed by the United States on foreign bills of lading was held unconstitutional as violating the prohibition against taxes on articles exported. The Court, referring to *Almy* v. *California,* 24 How. 169, holding a stamp tax by a State on bills of lading for gold shipped out of the State unconstitutional, said (p. 294):

> "In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished

indirectly by legislation which accomplishes the same result."

In *Macallen* v. *Massachusetts,* 279 U. S. 620, this statement is quoted and stated to be "the well established rule" (p. 629).

In the *Fairbank* case the Court further said (p. 300):

> "Or, in other words, constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

In the *Pollock* v. *Farmer's Loan & Trust Co.,* 157 U. S. 429, 581, the Court said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, * * *. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

The principle is fully sustained by the cases cited and analyzed below.

D. ANY INTERFERENCE BY THE FEDERAL GOVERNMENT WITH MATTERS WHICH ARE WITHIN THE STATE'S JURISDICTION IS UNCONSTITUTIONAL IN A TWOFOLD SENSE.

It clearly follows from the principles established above that the right of the States to exercise without interference by the United States, authority over all matters jurisdiction of which is reserved to them, is a fundamental principle of the Constitution.

Any such interference is unconstitutional in a twofold sense: *first,* it exceeds the powers granted the United States by the Constitution; *second,* it violates the rights expressly reserved to the States.

In *Hammer* v. *Dagenhart, supra,* the Court said (p. 276):

> "Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."

This principle is also recognized in *Veazie Bank v. Fenno,* 8 Wall. 533, 541, where the Court said:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

E. APPLICATION OF THESE PRINCIPLES.

The United States can only exercise the powers expressly granted it. In determining what these powers are there is no presumption in favor of a grant of power to the United States; the limitations of the Tenth Amendment reserving all powers not granted to the United States to the States and the people must be given a fair and reasonable construction so as to carry out the purposes and spirit of the Constitution.

Furthermore, to carry out these purposes, neither a State government nor the United States can accomplish by indirection what it can not accomplish directly.

The division of power between the States and the

United States is a fundamental and basic principle of the Constitution. In case of doubt, or in case of an apparent conflict of powers, "a practical construction" must be adopted so that "neither power will nullify or substantially impair the other." This is the principle applied in determining the limits imposed on Congress in the regulation of interstate commerce which is expressed in the principle that only matters which constitute interstate commerce or directly affect interstate commerce are subject to the control of Congress. Action concerned with the normal control of internal affairs, even though they may affect interstate commerce, are held to affect it only indirectly, since otherwise Congress would have power to defeat the purpose of the Constitution which was to leave control of internal affairs to the States.

VII.

THE IMPORTANCE OF THE SYSTEM OF DUAL SOVEREIGNTY UPON WHICH THE CONSTITUTION IS BASED.

Before discussing the particular powers granted the federal government by the Constitution, which the government contends permits this legislation, it is essential to discuss the general principles which are pertinent in this discussion.

A. THE EMBODIMENT OF THIS PRINCIPLE IN THE CONSTITUTION WAS THE NECESSARY RESULT OF THE PREVAILING CONDITIONS.

The fundamental and unique principle of the Constitution is the system of dual sovereignty for which it provides. The formulation of this system made the adoption of the Constitution, possible and is a basic principle in the light of which any interpretation of its meaning must be made.

HISTORICAL REASONS FOR THIS PRINCIPLE.

The principal reasons which resulted in our dual form of government under which the federal government holds and may exercise only certain enumerated powers while to the States and the people are reserved unconditionally all other powers, may be summarized as follows:

A. FEAR OF STRONG CENTRAL GOVERNMENT.

First. The same apprehensions which caused the limitations expressly contained in the first nine amendments, namely, the fear of oppression by a strong central government not subject to local control. The spirit of the New England town meeting was strong. The experience of the colonies with England had implanted the belief that large or unlimited powers in a centralized

government would inevitably lead to the loss of that liberty which they had just attained.*

B. FEAR OF OPPRESSION OF MINORITY STATES BY MAJORITY.

Second. The desire engendered by strong sectional feelings of the colonies to prevent so far as possible oppression of a minority of States by a majority which might be in control of the federal government, since the interests of such majority might be very different from and perhaps hostile to the minority States.

This feeling appeared in the debates at the Constitutional Convention, and is shown in various provisions of the Constitution itself. George Mason, delegate from Virginia, said, "The Southern states are in a minority in both houses. Is it to be expected that they will deliver themselves, bound hand and foot, to the Eastern states and enable them to exclaim, in the words of Cromwell on a certain occasion . . . 'The Lord hath delivered them into our hands'?" (*Debates in the Federal Convention* . . . by James Madison, Hunt & Scott ed., p. 485.)

The South especially feared that the right to regulate foreign commerce would be used to the detriment of the southern agricultural states which were in a minority

*NOTE. "The strong local pride and attachment of citizens to their particular colonies were naturally intensified by the rise in status of those colonies to independent sovereignties. An exhausting war had just been fought for the sole purpose of freeing themselves from the control and tyranny of a higher power having jurisdiction over them. To substitute for that power another superior one, even though of their own making, seemed fraught with heavy risk." (James Truslow Adams, *America's Tragedy*, p. 20.) "As Burke had said, 'the Americans were accustomed to snuff the approach of tyranny in every tainted breeze.' When the east wind ceased to blow, they discovered the same deadly odor in their own westerly. One might safely entrust a quantum of power to one's State government, where the legislators were friends or neighbors; provided elections were frequent and the scope of government limited by a Bill of Rights." (*History of the United States, 1783-1917*—Morison, pp. 38, 39).

and to the advantage of the eastern commercial states. Hence the restrictions that no tax may be laid on articles exported from any State and no preference given to the ports of one State over those of another. To protect against discrimination in taxation by a hostile majority of States, provision was made that no direct taxes may be levied except on the basis of representation by the States and all duties, imports and excises must be uniform. Likewise, for the same purpose the small States were given an equal representation in the Senate with the largest State.

C. FEAR OF INTERFERENCE WITH SLAVERY.

Third. The more southern slave States were unwilling to enter a union which had any power to interfere with slavery.

D. DESIRE FOR LOCAL SELF GOVERNMENT.

Fourth. The belief that local affairs could be best administered locally and that only the minimum of power necessary for the central government should be granted.

For these reasons not only were the powers granted to the federal government limited to matters deemed essential but even these powers were restricted.

Section 9 contains eight restrictions. The first eight amendments by the First Congress adopted pursuant to the understanding on which the Constitution was accepted, consists entirely of restrictions intended to prevent the central government from taking arbitrary and oppressive action. There are other restrictions in the Constitution showing the ever present intent to prevent interference by the central government with matters of local concern, including even the provision that the federal government shall not have complete jurisdiction over forts, magazines, and arsenals situated within the

borders of a State unless purchased with the assent of a State.

Finally, to leave no doubt as to this intent, Amendment IX provides that the enumeration of certain rights shall not be construed "to deny those retained by the people" and the Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". This Tenth Amendment did not strip the federal government of any powers granted it by the original Constitution. In this respect, it added nothing to the Constitution. (*United States* v. *Sprague,* 282 U. S. 716, 733; Madison, I *Annals of Congress,* 441.) But it added much in the way of emphasis. It underlined, so to speak, the powers which were reserved and emphasized in an unmistakable manner that the preservation to the states of control over their internal affairs is a vital, fundamental principle of the Constitution, and that it can not be interpreted so as to impair or destroy this exclusive control of the States over their internal affairs without violating its purpose and intent.

B. THE SYSTEM OF DUAL SOVEREIGNTY AND CITIZENSHIP.

A. DUAL SOVEREIGNTY.

President Monroe, describing our dual system, said:

> "There were two separate and independent governments established over our Union, one for local purposes of each State by the people of the State, the other for national purposes over all the States by the people of the United States. The whole power of the people, on the representative principle, is divided between them. The State governments are independent of each other, and to the extent of their

powers are complete sovereignties. The National Government begins where the State governments terminate, except in some instances where there is a concurrent jurisdiction between them. This Government is also, according to the extent of its powers, a complete sovereignty.

. . . . . .

"It is impossible to speak too highly of this system taken in its two fold character and in all its great principles of two governments, completely distinct from and independent of each other, each constitutional, founded by and acting directly on the people, each competent to all its purposes, . . ." (President Monroe's *Views on Internal Improvements* submitted to Congress, May 4, 1822. Richardson's *Messages and Papers of the Presidents,* Vol. II, pp. 144-148.)

B. DUAL CITIZENSHIP.

Thus, under the Constitution, we have a dual citizenship. In *United States* v. *Cruikshank,* 92 U. S. 542, 549, the Court said:

"We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other."

Each sovereignty is entitled to obedience by the citizens within its constitutional field of power but not outside of that field.

C. DUAL GENERAL WELFARE.

"Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power (citations), as do the States in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government. . . ." (*Nebbia* v. *New York*, 291 U. S. 502, 524.)

C. THE NECESSITY OF PRESERVING THE SOVEREIGNTY OF THE STATES AND THE CONTROL OF LOCAL MATTERS HAS ALWAYS BEEN RECOGNIGED BY THIS COURT.

In *Texas* v. *White*, 7 Wall. 700, 725, the Court said:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

In *Lane County* v. *Oregon*, 7 Wall. 71, 76, the Court said:

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States * * * * * *."

In *The Collector* v. *Day,* 11 Wall. 113, 124, 125, where the power of the United States to tax the salary of an officer of a State was involved, the Court said:

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States. * * * * *
>
> "Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States. * * * * *
>
> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, * * * * * "

In *Hammer* v. *Dagenhart, supra,* at p. 275, the Court said:

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution."

In *Twining* v. *New Jersey,* 211 U. S. 78, 92, the Court said, with reference to the Fourteenth Amendment, that

it limited the powers of the States and therefore it was the duty of the Court to enforce such limitations, but it added:

> "But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union."

D. REASONS FOR DIVISION OF JURISDICTION STILL VITALLY IMPORTANT.

As the Constitution clearly provides that the preservation of the rights and jurisdiction over internal affairs reserved to the States is a fundamental principle of the Constitution, only an amendment can authorize any impairment of these reserved rights.

It may be well, however, briefly to show the importance and vitality of this principle at the present time.

During the last few years, it has been urged that the federal government should have authority to control such matters reserved to the States as the federal government decides it can deal with more effectively than the States. When local conditions seem chaotic, it is natural to seek aid elsewhere. This danger was emphasized by Chief Justice Taft in the *Child Labor Tax Case,* 259 U. S. 20, 37, where he said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We can not avoid the duty even though it requires us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an

insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. *In the maintenance of local selfgovernment, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.*" (Italics ours.)

Woodrow Wilson in his *Constitutional Government in the United States,* says:

"Uniform regulation of the economic conditions of a vast territory and a various people like the United States would be mischievous, if not impossible. The statesmanship which really attempts it is premature and unwise. (p. 179.) * * * *

"It is this spontaneity and variety, this independent and irrepressible life of its communities, that has given our system its extraordinary elasticity, which has preserved it from the paralysis which has sooner or later fallen upon every people who have looked to their central government to patronize and nurture them. (pp. 182-183.)

"It would be fatal to our political vitality really to strip the States of their powers and transfer them to the federal government. It cannot be too often repeated that it has been the privilege of separate development secured to the several regions of the country by the Constitution, and not the privilege of separate development only, but also that other more fundamental privilege that lies back of it, the privilege of independent local opinion and individual conviction, which has given speed, facility, vigor and certainty to the processes of our economic and political growth. *To buy temporary ease and convenience for the performance of a few great tasks of the hour,*

at the expense of that would be to pay too great a price and to cheat all generations for the sake of one.'' (pp. 191-192.) (Italics ours.)

Mr. Justice Brandeis said in *New State Ice Co. v. Liebmann,* 285 U. S., 262, 311,

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."*

The North Dakota legislation which came before the Supreme Court in *Green v. Frazier,* 253 U. S. 233, was a social experiment which turned out disastrously, but the unfortunate consequences were largely localized. Had the experiment been tried on a national scale, it would have resulted in a national disaster.

William Jennings Bryan said with respect to extending the national powers,

> "Not only would national legislators lack the time necessary for investigation, and therefore lack the information necessary to wise decision, but the indifference of representatives in one part of the country to local matters in other parts of the country would invite the abuse of power. Then, too, the seat of government would be so far from the

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*NOTE. Chief Justice Taft said, "There is a great advantage in having different State governments try different experiments in the enactment of laws and in governmental policies, so that a State less prone to accept novel and untried remedies may await their development by States more enterprising and more courageous. The end is that the division of opinion in State governments enforces a wise deliberation and creates a *locus poenitentiae* which may constitute the salvation of the Republic." (*Popular Government,* p. 155.)

great majority of the voters as to prevent the scrutiny of public conduct which is essential to clean and honest government. The union of the separate states under a central government offers the only plan that can adapt itself to indefinite extension." (*Central Law Journal*, 1908, p. 273, quoted in *Thompson, Federal Centralization*, p. 364.)

VIII.

REGULATION OF AGRICULTURE IS SOLELY A MATTER OF STATE JURISDICTION

This proposition needs little argument. Agriculture is essentially local. There is no power granted the federal government which can by any possibility be construed to give Congress any control over it.

The most important matters within the control of the States are local government, education, police, agriculture, manufacturing, and mining, and the general health and the safety of the citizens of the State, and other similar matters falling within the police power. This Court in *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, said that manufacturing is a local business and added:

> "Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

Agriculture is even more intrinsically local than manufacture as the latter may require the transportation, in interstate commerce, of the supplies and raw materials to be manufactured as well as the shipment in interstate commerce of the manufactured articles. But in the case of agriculture, commerce does not begin and can not begin or be affected until such products are produced and harvested. See *Schechter* v. *United States, supra; Kidd* v. *Pearson,* 128 U. S. 1; *Industrial Asso.* v. *United States,* 268 U. S. 64, 82.

IX.

POWERS GRANTED THE UNITED STATES BY THE CONSTITUTION WHICH THE UNITED STATES CONTENDS JUSTIFY THIS LEGISLATION.

The United States contends that the power to regulate agriculture in the manner attempted by this legislation is conferred by the Constitution.

First. Under the power to tax for the general welfare of the United States.

Second. By reason of the right of the United States to carry out its fiscal policies.

The contention is not made that the interstate commerce clause justifies this legislation. However, since the District Court based its decision on the interstate commerce clause, we shall consider the application of this clause briefly, especially as such consideration will tend to clarify the issues in this case.

X.

THE INTERSTATE COMMERCE CLAUSE DOES NOT JUSTIFY THE PRESENT LEGISLATION.

Agriculture is intrinsically a local matter and not subject to control by Congress (*supra*, p. 66).

The growing of crops is obviously not commerce, nor is it an instrumentality of commerce like a railroad. The growing of crops affects the amount of interstate commerce in such commodities. But it is abundantly established that reduction or increase in the growing of crops, the manufacture of commodities, or the mining of minerals, even though such crops, commodities, or minerals are intended for shipment in interstate commerce, is not itself interstate commerce and, therefore, not subject to federal control.

It is, of course, true that an act though seemingly wholly disconnected with interstate commerce may become unlawful if done as part of a scheme to restrict interstate commerce. In such case the direct purpose of the act being to regulate interstate commerce, it can properly be regarded as directly affecting and, therefore, be subject to control by Congress.

Where, however, the act in question is merely normal action respecting a matter wholly internal to the States, then, although it may affect interstate commerce, such effect is clearly held to be indirect and not subject to the control of Congress.

Thus, a State may prohibit the manufacture of liquor because it deems such manufacture against its public policy although the effect is to completely prevent interstate commerce in such liquor. To hold otherwise the result would be as stated in *Kidd* v. *Pearson*, 128 U. S. 1, 21,

"that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago?"

Thus, although a certain action may seriously affect interstate commerce, it is not for this reason subject to federal control. If the action deals with a local matter and is not part of an unlawful plan to restrict interstate commerce, its effect on interstate commerce is held to be indirect and not subject to Congressional control.

In *Levering & G. Co.* v. *Morrin*, 289 U. S. 103, it was held that a conspiracy to suppress local building operations solely for the purpose of compelling employment of union labor is not a conspiracy to restrict interstate commerce merely because it curtails the sale and shipment of materials in interstate commerce. The Court said (p. 107),

"*Use* of the materials was purely a local matter and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy."

In *Industrial Association* v. *U. S.*, 268 U. S. 64, it was held that a combination to establish the open shop plan of

employment by requiring builders who desired building materials of certain kinds to obtain permits, did not violate the Sherman Anti-Trust Act. The Court said (p. 82),

> "The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation—for building is as essentially local as mining, manufacturing, or growing crops—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

In the present case we have a purely local situation. Farmers were merely exercising their normal right to grow crops which, after they were harvested, might be shipped in interstate commerce. There was no intent or plan to obstruct interstate commerce.

Congress by the present legislation was not even attempting to remove any obstruction to interstate commerce. If there is any such obstruction it has been created by the Secretary of Agriculture in inducing the farmers to enter into a combination to restrict their crops in order to obtain higher prices and thus to restrict the amount of crops shipped in interstate commerce and the prices received therefor.

It is clear, therefore, that the commerce clause affords no justification for the present legislation.

XI.

THE THREE DIFFERENT INTERPRETATIONS OF THE GENERAL WELFARE CLAUSE.

Congress is given authority—

> "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States."

The Government in its discussion of this so-called welfare clause contends that even though Congress has not the power to regulate agriculture by direct legislation, and therefore directly to put its desired plan into effect, nevertheless it can under this so-called welfare clause impose taxes to be paid to farmers to induce them to conform to its scheme.

We contend that under no interpretation of the welfare clause which has so far received any support can Congress so tax for the express purpose of applying the money on such conditions as to effect a regulation of agriculture.

THE THREE INTERPRETATIONS OF THE WELFARE CLAUSE.

Three interpretations of this clause have been advanced:

1. That it constitutes two separate grants of power: *first,* the power to tax; and *second,* as a wholly separate power, the power to legislate in any manner Congress deems appropriate for the general welfare of the United States.

2. That Congress is authorized to tax for all matters which concern the general welfare of the United States, the United States being the political body created by the Constitution and the general welfare for which it may

tax being the matters which have been confided to its charge and for which it is responsible, and not matters for which by the express provisions of the Constitution it has no responsibility under the Constitution or the right to exercise any authority. In other words, under this interpretation the power to tax was given Congress in order to enable it to carry out its authorized powers and therefore taxes can be levied only for the purposes comprised within its enumerated powers. This view was strongly held by Madison and is hereafter referred to as the Madisonian interpretation.

3. The third view, on which the Government relies, which was sponsored by Hamilton, and is hereafter referred to as the Hamiltonian interpretation, is that the clause authorizes Congress to tax not only to enable the United States to appropriate money to carry out the powers and responsibilities conferred on it by the Constitution but also to appropriate money for other objects which concern the general welfare of the people of the United States although Congress has no power to legislate as to or control such matters.

VIEW THAT THE WELFARE CLAUSE GIVES INDEPENDENT POWER TO LEGISLATE AS TO ALL MATTERS OF GENERAL WELFARE.

The first interpretation, namely, that the clause should be read as giving, first, the power to tax and, second, an independent power to legislate for the general welfare of the people of the United States including in the phrase "general welfare" matters not embraced within the enumerated powers has never been very seriously advanced and is now generally rejected, and we believe needs no further consideration. The government admits this interpretation is inadmissable.

If so construed as an independent, substantive grant of power, it would render wholly unimportant and unnecessary the subsequent enumeration of specific powers and would create a general authority in Congress to pass all laws which Congress may deem for the general welfare. As stated by Judge Story, "under this interpretation, the Constitution would practically create an unlimited national government" (Story *Commentatives on the Constitution,* 5th Ed., Sec. 909). It is well established that Congress has no such authority.

THE GOVERNMENT'S CONTENTION IS BASED ON THE HAMILTONIAN INTERPRETATION OF THE WELFARE CLAUSE.

The Government bases its contention on the Hamiltonian interpretation of the welfare clause, viz.: that although the United States has no power or right to legislate with respect to or regulate matters not included within its enumerated powers, it, nevertheless, may appropriate and apply tax moneys to other matters not embraced within the enumerated powers, which matters it can not control or regulate. It contends that in the present case we have a mere appropriation of money for the benefit of agriculture, and that this legislation constitutes no control or regulation of agriculture. It bases its position on the contention that in making an appropriation Congress can specify the objects to which the money is to be applied; that in the present case Congress merely specifies that the benefits shall be paid to those farmers who agree to conform to and carry out its scheme to restrict agriculture; that it does not compel any farmer to conform so that no direct regulation is exercised, and that, therefore, the legislation merely amounts to an appropriation of money.

WE CONTEND THAT THE MADISONIAN INTERPRETATION OF THE WELFARE CLAUSE IS CORRECT, BUT THAT NEITHER THE MADISONIAN NOR THE HAMILTONIAN INTERPRETATION JUSTIFIES THE PRESENT LEGISLATION.

We submit that the Madisonian interpretation of the welfare clause is correct. If so, since Congress is given no power to control agriculture, no tax can be levied for the purpose of paying the proceeds to farmers to benefit agriculture.

We further confidently submit that if the Hamiltonian interpretation of the welfare clause is adopted, it clearly does not justify the present legislation which directly effects and is intended to effect a regulation of agriculture.

We propose to discuss both the Madisonian theory and the Hamiltonian theory as to the interpretation of the general welfare clause.

The meaning and scope of this clause has never been interpreted by this court. In *United States* v. *Realty Co.*, 163 U. S. 427, the court said, of this question:

> "The question is one of the greatest importance. It should not be decided without very mature investigation and deliberation. . . ."

This lack of judicial interpretation and the importance of the question is our excuse for the extended discussion which follows.

XII.

MADISON'S INTERPRETATION OF THE WELFARE CLAUSE SHOULD BE ACCEPTED.

We submit that the Madisonian interpretation of the welfare clause—namely, that Congress is only authorized to levy taxes to be used with respect to matters within the federal field of power—is correct. If so, it follows, necessarily, that power to control agriculture not having been conferred on Congress, the regulation and control of agriculture—as, in the present case, by the Agricultural Adjustment Act—is not one of the purposes for which taxes can be constitutionally levied.

1. THE SITUATION AT THE TIME OF THE ADOPTION OF THE CONSTITUTION SHOWS NO POWERS NOT ESSENTIAL GRANTED THE UNITED STATES.

The Articles of Confederation which created "The United States of America", proposed in 1777 and finally ratified by the requisite number of states in 1781, granted insufficient power to create a real nation.

The purported rights granted Congress were sufficient in many respects but the Federal Government lacked all powers to function efficiently, since for practical purposes it could enforce its will in the matters confided to it only with the consent of the states and its only means of raising revenue to carry out its purposes was by requisitions on the states which they refused to comply with. Its authority was therefore flouted and it was helpless and held in general contempt.

Washington wrote to Jay in 1786,

> "I do not conceive we can exist long as a nation without having lodged somewhere a power which will pervade the whole union in as energetic a manner, as the authority of the States Governments extends

> over the several States. . . . Requisitions are a perfect nullity, where thirteen sovereign, independent, disunited States are in the habit of discussing and refusing compliance with them at their option. Requisitions are little better than a jest and a byeword throughout the land. If you tell the Legislature that they have violated the treaty of peace and invaded the prerogatives of the Confederacy, they will laugh in your face." (Letter of Washington to Jay, August 1, 1786, Charles Warren, *Making of the Constitution*, pp. 17-18 and cf. *The Federalist*, No. XV.)

Neither the United States nor the States had credit. Business was in a collapse. Shay's Rebellion brought fears of revolution and the possible alternatives of complete disorder or a strong monarchial government.

It was deemed essential by the thoughtful and the business interests that the United States be given direct power to fulfill its functions—to deal with foreign nations, to defend the country against attack, to control foreign trade so that it could exact trade agreements with England and other commercial nations, and to insure harmony among the States by controlling interstate relations. The right to enforce its powers in these respects and to enforce by direct action the collection of taxes necessary for these purposes was deemed essential.

On the other hand, there was a strong reluctance to grant power to any authority other than the individual States and local government units.

Mr. Justice Story in his *Commentaries* says,

> "That which strikes us with most force is the unceasing jealousy and watchfulness everywhere betrayed in respect to the powers to be confided to the General Government. For this several causes may be assigned. The Colonies had been long engaged in struggles against the superintending authority of the

Crown and had practically felt the inconvenience of the restricted legislation of the parent country. These struggles had naturally led to a general feeling of resistance to all external authority; and these differences to extreme doubts, if not to dread of any legislation, not exclusively originating in their domestic assemblies." (*Commentaries on the Constitution*, 5th Ed., Vol. 1, p. 173.)

See also *supra* pp. 54-57.

Great jealousy also existed among the States and a very grave fear that the States might be oppressed by a central government controlled by a hostile majority of the States, or a majority whose interests differed from those of the minority.

John Dickinson of Delaware said to Madison,

"... We would sooner submit to a foreign power than submit to be deprived of an equality of suffrage in both branches of the Legislature, and thereby be thrown under the domination of the large states." (Charles Warren, *The Making of the Constitution*, p. 218.)

This fear of domination by a majority of States whose interests were different was due to the vital social and economic differences existing among the States.

"Virginia was much more unlike Massachusetts than Massachusetts was unlike England. The Carolinas, with their lumber and forests and their rice fields felt themselves utterly unlike Virginia; and the Middle states, with their mixture of population out of many lands, were unlike both New England and the South." (Woodrow Wilson, *Constitutional Government in the United States*, p. 45.)

There were also the differences between the slave States and the free States; the more southern States were de-

termined that slavery should not be interfered with by the central government. Commercial interests differed greatly; the southern States were almost entirely dependent upon their exports of tobacco, rice, and indigo, while Massachusetts and the other New England States were dependent upon the carrying trade and the fisheries.

Furthermore, the States feared taxation by any authority other than the local government as the abuse of the power of taxation had been one of the motivating causes of the Revolution.

The Constitution was a compromise between these conflicting points of view. The provisions of the Constitution therefore protected a minority of the States against the oppression of a hostile majority so far as this was possible. An attempt was made to limit the powers actually granted the federal government against abuse, by various restrictions, and by the first ten amendments, which were adopted in accordance with the understanding on which the Constitution was accepted.

One thing seems clear—that no important powers were intended to be granted the United States which were not deemed necessary to the accomplishment of the main purposes in view. It was doubtful if the Constitution would be adopted even if these powers were granted. Certainly, it was far from any intention of the members of the Convention to increase the risk of rejection by including any important grants of power which were not deemed essential.

2. MADISON'S DOCTRINE IN ACCORD WITH FUNDAMENTAL PRINCIPLES.

(a) Under dual system, provision for welfare divided between state and federal governments.

A government is organized to provide for the general welfare of its citizens. The function of a single unitary government is to provide for the welfare of its citizens in all respects in which it is proper for a government to act.

Under our system of dual governments, we have two sovereignties acting on the same individuals.

> ". . . and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other." (*United States* v. *Cruikshank*, 92 U. S. 542, 549.)
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> ". . . The power to promote the general welfare is inherent in government. Touching matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacities, touching all subjects jurisdiction of which is not surrendered to the federal government." (*Nebbia* v. *New York*, 291 U. S. 502, 524.)

(b) Division of powers marks division of responsibility.

Responsibility for the general welfare of the people living in the territory comprised within the United States is thus divided. That concerned with matters over which the United States has the right and duty to control is the general welfare of the United States. That in respect to matters which the States have the right and duty to control is the general welfare of the States.

(c) "United States" designates the political body.

When the Constitution gave the United States authority to levy taxes to provide for the "general welfare of the United States" it seems clear that this general welfare related solely to matters with which the United States as a political body had the right and duty to deal.

Taxes may be levied "to pay the debts and to provide for the common defence and general welfare of the United States". It is the debts of the United States as a political body which are to be paid, not the debts of the people of the United States; it is the common defense in war which is to be provided for, and since only the United States can declare and engage in war, it is necessarily the common defense of the United States, as distinguished from the States, which is intended. It is the general welfare of the United States as a political body which is to be provided for, so that thereby the people under its protection will be benefitted in their federal relations—as citizens of the United States and not in any other capacity or status.*

(d) General design to "promote general welfare" was to be through exercise of delegated power.

The Constitution in its preamble recites that it is established to "promote the general welfare". It must be presumed that this purpose of promoting the general welfare was, for the purposes of the Constitution, to be fully accomplished by conferring on the United States the enumerated powers set forth in the Constitution,

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**Note.* An examination of the Constitution shows over forty instances where the words "United States" or "United States of America" are used to designate the body politic. In a few cases the words refer to the territory under the jurisdiction of the federal government. In no case do the words mean—"people of the United States." In the Preamble, the "people of the United States"—the creative power—are distinguished from the "United States of America"—the created body politic.

leaving the control of other matters with the States. It follows that the general welfare of the United States is the general welfare touching matters, power over which was confided to the United States. If we hold that there are matters of general welfare of the United States which the United States is not authorized to control, but for which it can only apply money, we reach the absurd result that a constitution expressly framed to promote the general welfare did not give Congress any direct power to promote it with respect to certain matters.

This view is strengthened by other considerations.

(e) Taxing power normally auxiliary to regulatory power, and this is reasonable.

In the first place, the taxing power would normally and naturally be given for the purpose of carrying out those matters with which the government was authorized to deal. The government of the United States and the government of the States are similar to the multiple "districts" or organs of local government set up in some of our States. For example, the same people and the same territory may be organized locally into a municipality, a school district, and a fire district, each having control of its own functions and each having the taxing power. It would take very strong, explicit language in the governing statutes to convince one that the school district was empowered to tax and apply the money to the purchase of fire apparatus to be controlled by the fire district, or for the payment of salaries of policemen controlled by the municipality. Yet the situation is the same here. The United States has no duty or authority, except in connection with its powers. It would be wholly unnatural to give it power to tax for objects over which another sovereignty has the exclusive responsibility and authority. It is impossible to answer John Randolph

Tucker's questions

> "That a government should have this great means to execute powers of other governments reaches the point of absurdity. Why should a government be given means to execute a power which is denied to it and confided to another? Why give it the power to help another to do what is denied to it? If Congress cannot be trusted with the grant of a power, why give unlimited discretion to Congress to raise money to enable one not entrusted with the power by Congress to perform it? Can such folly be attributed to the framers of the Constitution?" (*Constitution of the United States,* p. 480),

The same rule applies to private corporations. A corporation authorized to engage in the cotton manufacturing business can not raise and employ its funds in a mining enterprise, which business it was not allowed to conduct, on the plea that it is permitted to raise funds for its general welfare and that success in the mining business would promote its general welfare and that of its members.

(f) Power to appropriate is an implied power auxiliary to the vested powers.

The Hamiltonians neglect, in their discussion, the fact that this clause is a clause authorizing the levying of taxes; that is the object sought. The words "to pay the debts and provide for the common defence and general welfare of the United States" are only a restriction, as Story himself points out, a statement of the purposes for which taxes may be raised. The Hamiltonians, however, when they come to interpret the clause, read it as granting the power to tax and the further right to appropriate the proceeds for these purposes. But the clause does not say so. Nowhere in the Constitution is any ex-

press power to appropriate provided for. It is an implied right which accompanies each power granted so far as necessary as a means of executing the power. Here we have a power to tax. There is an implied right to appropriate money for the expense of collecting the tax. There is no implied right given by a taxing section to appropriate money for any other purpose. In other words, the only right to appropriate given by the Constitution is implied,—the right to appropriate as a means of carrying out a power. But since the only power given by this section is the power to tax, there is no implied right to apply money to agriculture, but only to the collection of taxes. Had such a right been intended, it would have been granted as an express power—the power to appropriate for these purposes. It seems clear that the "general welfare" as here used was not intended to include matters beyond the scope of the enumerated powers, so that it was not necessary to grant the power to appropriate for the "general welfare" since that right, to the extent intended, was covered by the implied right to appropriate for the purpose of carrying out the granted powers.

(g) Only explicit language would justify accepting Hamiltonian view.

It would take very clear and explicit language to convince one that language in a constitution giving the authority to tax authorizes a sovereignty to tax for purposes which, by the terms of the same instrument, are confided to another sovereignty. In other words the language would have to be so explicit as to permit of no other interpretation.

But here we have no such clear, explicit language. On the contrary, we submit that the language clearly shows that no such right was intended. The language surely is

not sufficiently clear and explicit to require the meaning contended for. If it were, this dispute as to its meaning would not have arisen.

(h) Opinion of Chief Justice Marshall.

This view is supported in clear language by Chief Justice Marshall. In *Gibbons* v. *Ogden,* 9 Wheat. 199, he said that—

> "Congress is not empowered to tax for those purposes which are within the exclusive province of the States."

In this case Marshall holds that though the State and the United States can tax the same subject, they are exercising different powers because each taxes for the objects confided to it and neither one can tax for the powers confided to the other. If this is so, it is clear that the United States can not tax for the purpose of accomplishing an object over which the States have exclusive jurisdiction, as in the case of agriculture.

3. IT IS INCONCEIVABLE THAT THE CONVENTION SHOULD HAVE GIVEN THE FEDERAL GOVERNMENT POWER TO RAISE MONEY TO PROVIDE FOR MATTERS WITH RESPECT TO WHICH THE STATES RETAINED THE POWER TO TAX AND OVER WHICH THEY INSISTED ON KEEPING CONTROL.

As we have shown, the Constitution, especially in matters of taxation, was intended to confer only such power on the central government as was essential to enable it to perform its functions. Power to raise money to be applied to purposes which the States had the acknowledged authority to provide for and the exclusive power to control was certainly not essential.

It must be remembered that at the time of the adoption of the Constitution people had little confidence in the central government; they feared its power and

doubted if it would not be controlled by a hostile majority from other States. The population of each State was comparatively small. The citizens of each State could trust their friends and neighbors to care for their local interests; they could not trust a body, a majority of which was composed of citizens of other States. They were reluctant to give such a body any power. For what conceivable reason would they wish to give it the power to tax them in order to provide for local matters over which they insisted on retaining control and for which they retained the right to raise money by taxation?

4. THE HAMILTONIAN INTERPRETATION WOULD DEFEAT THE PUBLIC POLICIES WHICH THE STATES HAVE THE RIGHT AND DUTY TO DECLARE AND ENFORCE.

(a) Regulation through spending an invasion of State power.

Of course, if the right to appropriate money for matters concerned with the internal affairs of the State could be used, as it is used in the present case, to restrain and drastically interfere with and control an important local matter, it would be wholly repugnant to the fundamental principle of the Constitution, as we shall show in our discussion of the Hamiltonian view of the welfare clause.

But even if the right to appropriate money for intrastate objects is held not to authorize such a plan to restrain or regulate local matters, it would nevertheless affect the carrying out of the public policy of the States.

(b) Enlargement of federal taxing purposes a burden on State taxing power.

The resources subject to taxation are not unlimited. All taxes whether raised by the United States or by the States must be paid by the people of the United States. Even if larger taxes can be raised, it is not always politic to do so; nor can it necessarily be done without impos-

ing oppressive burdens. If the United States raises money to apply to local purposes, there is that much less that the States can raise wisely or without too much hardship. Unless, therefore, the United States applies the money to the purposes to which the States wish it to be applied, they are necessarily thwarted to this extent in carrying out the purposes they wish to accomplish.

(c) Burden on State taxing power impairs State's ability to provide for welfare of its citizens.

Thus, Massachusetts might wish to devote money to encouraging manufactures, while the United States might apply it to education or vice versa. Since the amount of money available is limited, if it is applied to education, manufacturing, which at the time seemed more important to Massachusetts, would suffer. Thus, the policy of the State would necessarily be affected and thwarted.

Indeed, the United States could apply the money to undo some policy which the State had promoted, since, by declining to apply the proceeds to a project which the State had fostered and applying it to some contrary policy, what the State had accomplished would be undone.

(d) Enlargement of federal taxing purposes opens door to sectional discrimination.

In any event, the United States would not be likely to agree with each State on what was the wisest policy for the expenditure of the money in that State. It would be apt to apply general policies while the States would apply local policies suited to their own needs. If the United States were always to agree with each State, as to the wisest application of tax money in that State to local purposes, why should it wish or need the right to appropriate the money for the purpose, since the State it-

self could so raise and apply the money? The only reason would seem to be that with this power money could be raised largely in certain States or in a certain section to be spent for the welfare of other States or sections. But, if there is one thing clear in the history of the formulation and adoption of the Constitution, it is that those who formulated and those who adopted it had no such intention, and had they dreamed that the Constitution provided that taxes raised in one section of the country could be applied largely in another section of the country for local matters outside the powers granted the United States, the Constitution would have failed of adoption.

5. IF THE GENERAL WELFARE CLAUSE HAD BEEN DESIGNED TO ENLARGE THE TAXING POWER, A SIMILAR CLAUSE WOULD HAVE BEEN APPENDED TO THE BORROWING POWER.

Immediately following the clause in Article I, Section 8, permitting Congress to levy taxes, is the power "to borrow money on the credit of the United States". Under the Hamiltonian view, it is the provision that taxes may be levied "to provide for the general welfare of the United States" which gives Congress the power to raise money by taxation for purposes outside the sphere of federal control. But the borrowing power does not contain the words "to provide for the general welfare." Therefore, if the Hamiltonians are correct in their contention that the phrase "to provide for the general welfare of the United States" enlarges the purposes for which taxes may be levied, it would seem to follow that Congress did not have the right to borrow money for such enlarged purposes. If so, the result would follow that taxes could be levied for these enlarged purposes but money could not be borrowed for them. Such a result would be irrational.

It seems clear that if the Convention had intended to confer a sweeping power of expending money outside of the sphere of federal control, they would not have confined it to the taxing power. The delegates would have inserted a separate power, namely, the power to appropriate money whether derived from loans, or taxes to carry into execution the powers vested in the government of the United States, and, in other respects to promote the general interests of the people of the United States.

They would have made it clear that Congress could go outside the sphere of federal power in spending money, in the first place, and, in the second place, they would not have inserted the provision simply as an annex to the taxing clause but would have made it apply to revenue from all sources.

6. THE HAMILTONIAN INTERPRETATION WOULD DEFEAT THE EXPRESS RESTRICTIONS ON TAXATION IMPOSED IN THE CONSTITUTION.

The power to tax was a power which the people of the States were most reluctant to confer on Congress. They did so only because it had been proved that the United States under the Articles of Confederation was impotent without this power.

They restricted the power in every way they could to prevent its being used by a majority of States to oppress a minority and still give the requisite ability to raise money.

Charles C. Pinckney, Member of the Convention, said in the South Carolina House of Representatives, in January 1788,

> "We had many things to hope for from the National Government and the chief thing we had to fear from such a Government was the Risque of un-

equal or heavy taxation. . . ." (Max Farrand, *Records of the Federal Convention, Vol.* III, 83, *North Carolina State Records,* XX, pp. 777, 779.)

Thus, due to the fear that the northern and middle States, whose exports were comparatively small compared with the southern agricultural States, might levy excessive taxes upon exports of tobacco, rice and indigo, and thus oppress the southern States, it was provided that Congress should have no authority to tax exports. To provide so far as possible against imposing taxes which would be disproportionately burdensome to one section, it was provided that no direct taxes could be levied except on the basis of representation and that all duties, imposts, and excises must be uniform.

But these purposes would be defeated if the United States could levy taxes which were uniform or based on representation and apply the proceeds to local affairs as it saw fit. Even if the subject matter to which the money was applied was of a general character, it would obviously be possible to apply it so as to benefit some of the States disproportionately. Benefits applied to manufacturing would not have aided the South. Benefits applied to tobacco or rice would not have aided the North.

Had it been believed that any such power was granted, the Constitution would not have been adopted. In any event, it is clear that restrictions to prevent abuse similar to those imposed on taxation would have been imposed on the expenditure.

This objection to interpreting the clause as the Hamiltonians demand, is so cogently stated by Williamson, a member of the committee which drafted and reported the welfare clause in the Constitutional Convention, and a member of the first two Congresses, at the debate on the Codfisheries Bill in 1792, that we quote it at substantial

length. The Codfisheries Bill proposed what its supporters contended was only a drawback of duties. Williamson contended that the drawback would exceed the duties and would therefore be a bounty. He said:

> "Is it within the powers of this Congress to grant bounties? I think not; and on this single position I would rest the argument.
>
> "In the constitution of this Government there are two or three remarkable provisions, which seem to be in point. It is provided, that direct taxes shall be apportioned among the several States according to their respective numbers. It is also provided, that all duties, imposts, and excises, shall be uniform throughout the United States; and it is provided, that no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another. The clear and obvious intention of the articles mentioned was, that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another. It appeared possible, and not very improbable that the time might come, when, by greater cohesion, by more unanimity, by more address, the Representatives of one part of the Union might attempt to impose unequal taxes, or to relieve their constituents at the expense of other people. To prevent the possibility of such a combination, the articles that I have mentioned were inserted in the Constitution. . . .
>
> "But we have been told, that Congress may give bounties for useful purposes; that is to say, they may give bounties for all imaginable purposes; because the same majority that votes the bounty will not fail to call the purpose a good one. Establish the doctrine of bounties, and let us see what may follow. Uniform taxes are laid to raise money, and that

money is distributed—not uniformly; the whole of it may be given to the people in one end of the Union. Could we say in such a case that the tax had been uniform? I think not. There is certainly a majority in this House who think that the nation would be stronger and more independent, if all our labor was performed by free men. This object might be promoted by a bounty. Let a poll-tax be laid, according to the Constitution, of one dollar per poll: in this case sixty cents must be paid for each slave; and the number of slaves being 680,186, their tax would amount to $334,911. To encourage the labor of citizens, let Congress then give an annual bounty of one dollar to every free man who is a mechanic, or who labors in the field. We might be told that the bounty was small, and the object was good; but the measure would be most oppressive, for it would be a clear tax of rather more than three hundred thousand dollars on the Southern States.

"Perhaps the case I have put is too strong—Congress can never do a thing that is so palpably unjust—but this, sir, is the very mark at which the theory of bounties seems to point. The certain operation of that measure is the oppression of the Southern States, by superior numbers in the Northern interest. This was to be feared at the formation of this Government, and you find many articles in the Constitution besides those I have quoted, which were certainly intended to guard us against the dangerous bias of interest, and the power of numbers. Wherefore was it provided that no duty should be laid on exports? Was it not to defend the great staples of the Southern States—tobacco, rice, and indigo—from the operation of unequal regulations of commerce, or unequal indirect taxes, as another article had defended us from unequal direct taxes?

"I do not hazard much in saying, that the present Constitution had never been adopted without those preliminary guards in it. Establish the general doctrine of bounties, and all the provisions I have mentioned become useless. They vanish into air, and like the baseless fabric of a vision, leave not a trace behind. The common defence and general welfare, in the hands of a good politician, may supercede every part of our Constitution, and leave us in the hands of time and chance.

". . . Establish the doctrine of bounties, set aside that part of the Constitution which requires equal taxes and demands similar distributions, destroy this barrier, and it is not a few fishermen that will enter, claiming ten or twelve thousand dollars, but all manner of persons—people of every trade and occupation—may enter at the breach, until they have eaten up the bread of our children." (*Annals of Congress,* Second Congress, pp. 378, 379, 380, 381.)

7. THE WORDS "OF THE UNITED STATES" EMPHASIZE DISTINCTION BETWEEN OBJECTS OF FEDERAL AND OBJECTS OF STATE WELFARE-CONTROL; THE "SURPLUSAGE" CONTENTION IS UNFOUNDED.

The Government in its brief quotes the argument of Mr. Justice Story to the effect that the phrase would be robbed of any meaning unless given the effect contended for and also quotes Chief Justice Taney to the effect that no words in the Constitution can be rejected as superfluous.

Whatever the effect of the rejection of a single word, it is clear that certain provisions and phrases could be rejected without changing the meaning of the Constitution. They are recited for clarity and emphasis.

Thus, the Tenth Amendment did not change the Constitution or detract from the powers granted Congress. (See *supra* p. 57.) The last clause of Article I, Sec-

tion 8, permitting Congress to make laws necessary and proper for carrying into execution the powers vested by the Constitution in the United States, is intended for clarity and to prevent any contention to the contrary. The same construction would have been given the Constitution without it. (See Hamilton in *Federalist,* No. XXXIII.)

In the taxing clause, also, there are these words adding emphasis and clarity. Had Congress in the original draft of the Constitution merely been given power to tax, it would have been implied that the power was limited to taxing in aid of and in order to accomplish the powers granted to the United States. It was clear that without the words "to pay the debts and to provide for the common defence", Congress would have had power in such case to tax for these purposes. They add nothing but clarity. So, in the case of the additional words "for the general welfare of the United States", they show clearly that the taxes were to be levied for the general welfare of the United States as distinguished from the general welfare of the States.

The important change effected from the Articles of Confederation was from the right to make requisitions on States, which could not be enforced, to the power to lay taxes on individuals, which could be enforced,—as a means of raising revenue. There was no change as to amount which—theoretically at least—might be raised. In each case it was unlimited within the sphere of federal purposes. The words "common defence" and "general welfare," in both instruments, designated the collective federal purposes. The phrase "of the United States" renders emphatic the limitation to such federal purposes.

We submit that Mr. Justice Story's contention discloses the weakness of his case. It is a labored, unconvincing argument.

8. THE PURPOSES SOUGHT TO BE ACCOMPLISHED BY THE CONSTITUTION DID NOT REQUIRE, FOR THEIR ACCOMPLISHMENT THAT THE FEDERAL GOVERNMENT BE GIVEN POWER TO APPLY MONEY IN A FIELD NOT CONTROLLED BY IT, BUT RESERVED TO THE STATES.

In the period from the formulation of the Articles of Confederation until the adoption of the Constitution, there is contained in the letters of the leading statesmen, in the debates in the Convention itself, in the debates in the state conventions at which the Constitution was adopted and in the *Federalist,* a minute and complete discussion of the defects of the Confederation, the purposes to be accomplished by the new Constitution, and a statement of the powers granted by it and the objections thereto.

The student will not find a single reference by any responsible person to the necessity or desirability of giving Congress the power to tax for purposes beyond the scope of the matters which it was given power to control. Yet, this is a vast and important power, and one which surely would have been pointed out and discussed, had there been any intention of granting it.

The *Federalist* written principally by Hamilton and Madison discusses at length the purposes sought to be accomplished by the new Constitution, analyzes all of its provisions of any importance, and gives the reason for their necessity, and answers the objections made thereto. Yet, there is not a suggestion that the right now contended for was a desired objective or that it was provided for. The opposite is clearly implied.

"The opinion of the Federalist," said Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 418,

"has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed."

In *Federalist* No. XVI, Hamilton discusses the necessity for giving the federal government the right to act directly in enforcing its powers rather than through the state governments. In No. XVII, he meets the objection that this power will tend to render the central government too powerful and to enable it to absorb the power of the States. He first says that the regulation of the domestic affairs of the government would not be attempted. He adds,

"The administration of private justice between the citizens of the same state, *the supervision of agriculture and of other concerns of a similar nature,* —all these things, in short, which are proper to be provided for by local legislation—can never be desirable cares of a general jurisdiction." (Italics ours.)

Clearly, the implication is that supervision over agriculture and other similar local matters not only is not a proper function of the federal government but that it would not be a desirable care of the federal government, or one with which it would desire to concern itself.

Again in No. XXXIV Hamilton specifically designates "the encouragement of agriculture and manufactures" as among "the objects of state expenditures." If this is so, why provide the federal government with power to tax the citizens for the purpose of applying money to these matters?

In considering the defects of the Confederation and the requirements of a stronger government, it is not suggested that the power to apply money to the local affairs of the States is desirable or necessary.

In discussing the power of taxation, Hamilton says in No. XXXI,

> "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people."

It is clear that non-federal purposes were not committed to the care of the United States. It is also clear that the application of money would, necessarily, to some extent, affect and hamper the carrying out by the States of their public policies, as we have shown above. Thus, if Hamilton's statement is correct, the Federal Government should have power to tax and apply the money to the objects committed to its care, and the State governments power to tax and apply the money to the objects reserved for their care; and further, the Federal Government should not have the right to tax and apply the proceeds to objects reserved to the care of the States, or the States, power to tax for Federal purposes. If the Federal Government could tax for State purposes, the exercise of the power would necessarily interfere with the exclusive power of the States to deal with their own affairs, and in consequence the States would not (to quote Hamilton's words) be "free from any other control" but a regard for the public good.

No. XLI, written by Madison, deals with the question of whether any of the powers transferred to the Federal Government are unnecessary or improper or

whether the total grant is dangerous to the jurisdiction left in the States.

In this connection, Madison discusses the welfare clause. He first states,

> "It has been urged and echoed, that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defence or general welfare."

He then adds,

> "No stronger proof could be given of the distress under which the writers labor for objections than their stooping to such a misconstruction."

He then goes on to show that nothing is more natural nor common than first to use a general phrase and then to explain or qualify it by recital of particulars and that it is clear that the particulars here explain and limit the general clause. He further points out that the words were taken from the Articles of Confederation and that in those Articles they clearly were not intended to give the Congress under the Confederation unlimited powers.

It is to be noted that Madison does not mention what is now known as the Hamiltonian view. The reason, as we explain below, is that no such view had at the time been suggested by any responsible person. The objection presented was broader than the mere application of money. The claim had been made that Congress could "exercise every power." Naturally this included the application of money, but the objection was that Congress could legislate as well as apply money to matters not included within the specifically enumerated powers. Consequently the question considered by Madison in the

Federalist was whether the general welfare clause gave an unlimited power of *legislation.* Madison's line of reasoning is applicable to the narrower claim. Had it occurred to anyone that the right to appropriate as to such matters, but not the right to legislate with respect to them was granted, Madison would surely have referred to it.

In No. XV. Hamilton says,

> "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist." (Pages 90, 91).

In No. XV. and No. XXI. the lack of sanction to the laws of the subsisting Confederation is emphasized. In No. XXII. the necessity of national power to regulate commerce among the States is emphasized, and in No. XXIII. Hamilton sets forth the *principal purposes* to be answered by Union in the following words:

> ". . . . . the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries." (Page 144).

It is perfectly clear that the idea of giving the Federal Government power to spend money for purposes not confided to the Federal Government was utterly foreign to the purposes of the founders, and was entirely unnecessary as a means of curing the evils of the Confederation and attaining the great objects for which the Constitution was framed.

9. THE WORDS "COMMON DEFENCE" AND "GENERAL WELFARE" WERE TAKEN FROM THE ARTICLES OF CONFEDERATION, WHERE THEY HAD THE LIMITED MEANING FOR WHICH WE CONTEND.

The words "common defence" and "general welfare" were taken from the Articles of Confederation and should naturally be given the meaning which they had in that instrument.

In the Articles of Confederation the words did not mean objects which the States had the right and ability to control and over which the United States exercised no authority.

What "common defence" did mean in the Articles of Confederation was defense in a war, and since only Congress could declare war or peace it necessarily meant defense in a war in which the United States was engaged. What "general welfare" meant, was the welfare of the States which was common to all of the States, and was to be promoted by the use of the powers given to the Confederacy.

The Articles of Confederation had nothing to do with individuals in the States. It was a "league of friendship," (Article III) a "Confederacy," (Article I). The Articles were called "Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay" etc. It was executed by the several delegates "on the part and behalf of separate and individual states."

That these States were at that time recognized as being independent and sovereign States is well recognized in our Constitutional Jurisprudence. ". . . . all laws made by the several States, after the Declaration of Independence, were the laws of a sovereign and independent government." This was the utterance of a strong Federalist, Mr. Justice Chase in *Ware* v. *Hylton,* 3 Dallas, 199, 225.

"By the Revolution, the duties as well as the powers of government, devolved upon the people of New Hampshire." (Chief Justice Marshall, in *Dartmouth College Case,* 1819, 4 Wheat. 518, 651).

> "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government." (Mr. Justice M'Lean, in *Wheeler* v. *Smith,* 1849, 9 How. 55, 78.)

Various States passed laws for the encouragement by tariff or otherwise, of manufactures and new agricultural enterprises, and the tariff policy of the several States evoked sharp conflicts with their neighbors and was one of the causes which led to the calling of the Federal Convention.

Here we have the picture of thirteen States each independent of the others, and each legislating for the welfare of its own inhabitants, unrestricted by its neighbors and often times in antagonism to them.

The Articles of Confederation left the great bulk of these matters to the several States. The exclusive powers were given to the United States, in Congress assembled, by Article IX. of determining on peace and war, except in certain instances, of sending and receiving ambassadors, entering into treaties and alliances, with certain qualifications, of establishing rules in prize cases, of granting letters of marque and reprisal in times of peace, appointing courts for the trial of piracies and felonies committed on the high seas and cases of captures; they were given authority to determine disputes between two or more States concerning boundary, jurisdiction, or other causes; they were given the sole and exclusive right and power of regulating the alloy and

value of coin struck by their own authority, or by that of the respective States, fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits were not infringed; establishing and regulating post-offices; appointing all officers of the land forces, in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces; making the rules and regulations of the land and naval forces and directing their operations. They were given authority to borrow money or emit bills of credit on the credit of the United States; to build and equip a Navy; to agree upon the number of land forces and to make requisitions from each State for its quota. *These in general were the matters which Congress could deal with, and they were the matters which had to do with the* "COMMON *defence*" *of all of the States and their* "GENERAL *welfare*" *considered as a Confederation.*

The words "common defence" and the words "general welfare" are used in Article III and Article VIII of the Articles of Confederation. Article III provides:

> "The said States hereby severally enter into a firm league of friendship with each other, for their **common defence,** the security of their liberties, and their mutual and **general welfare,** binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever."

Article VIII provides:

> "All charges of war, and all other expenses that shall be incurred **for the common defence or general welfare,** and allowed by the United States in Con-

gress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint. . . ."

Article II provides:

"Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Can it be reasonably contended that under Article VIII Congress had authority to spend money for any other purpose except those concerning which it had been expressly given power to deal by the Articles of Confederation? We think not.

Madison in the debate of the Codfisheries Bill, (1792) said,

"It is to be recollected, that the terms 'common defence and general welfare', as here used, are not novel terms, first introduced into this Constitution. They are terms familiar in their construction, and well known to the people of America. They are repeatedly found in the old Articles of Confederation, where, although they are susceptible of as great latitude as can be given them by the context here, it was never supposed or pretended that they conveyed any such power as is now assigned to them. On the contrary, it was always considered as clear and certain, that the old Congress was limited to the enumerated powers, and that the enumeration limited and explained the general terms. I ask the gentle-

men themselves, whether it ever was supposed or suspected that the old Congress could give away the moneys of the State in bounties, to encourage agriculture, or for any other purpose they pleased? If such a power had been possessed by that body, it would have been much less impotent, or have borne a very different character from that universally ascribed to it." (*Annals of Congress,* Second Congress, p. 387.)

It is obvious that the United States, under the Articles of Confederation, did not seek to raise money for purposes which they did not attempt to control. Their original, primary purpose was to carry through the Revolution successfully. At all times they had insufficient money to pay their troops and pay for military supplies, and the debts which they had contracted for the purposes of the Revolution. In the four years after the Revolution ended, they were unable to raise money to pay their debts contracted for war purposes. The furthest possible thing from their minds was to raise money for matters which they did not attempt to control. They were unable to raise sufficient for the purposes they did attempt to control. The possibility or desirability of raising money to apply to State purposes was remote from anyone's mind. The sole question was whether they could raise enough money for their own purposes, and they failed in this.

THE CONTENTION OF THE GOVERNMENT—THAT THE GENERAL WELFARE CLAUSE WAS NOT GIVEN A RESTRICTED MEANING IN THE ARTICLES OF CONFEDERATION—IS NOT SUSTAINED BY THE EVIDENCE ADDUCED.

The contention of the Government, that under the Articles of Confederation, the Congress had power to requisition money from the States without restriction

as to the purpose for which it was to be used, (Government's Brief, page 142), is unsupported by evidence.

Remarks of Sherman.

Sherman said that the Congress of the Confederation had the right to say how much the people should pay and to what purposes it should be applied. (Government's Brief, p. 142.) All he meant was what purposes within the scope of their powers—in the same sense that it may be stated that the Board of Directors of a corporation has the right to say for what purposes the money of the corporation may be applied. The subject he was discussing was the proposal that the powers of legislation be vested in a congress of one branch, as under the Confederation. When the issue raised in the instant case was presented to Sherman in the first Congress, he showed plainly that he favored the Madisonian interpretation. (*Infra*, pp. 118-119.)

Madison's remark relied on by the Government.

The Government quotes Madison as saying that the practice under the Articles of Confederation was one of "undefined authority." Its implication is that Madison meant a practice of undefined authority with respect to the spending of money. But Madison was not talking about the *spending of money,* but the *exercise of power to legislate,* when he used those words, which are taken from the body of his letter to Stevenson. It is the supplement that deals with the Hamiltonian theory.

Nicholas' Speech in Virginia Convention.

The Government contends that Nicholas' speech in the Virginia Convention shows that he believed the welfare clause gave an unlimited right to appropriate money.

What Nicholas meant was that there was an unlimited right to raise money for the general welfare.

Nicholas' argument does not attempt to deal with the question of what subject matters were included under the general heading "common defence and general welfare." What would Nicholas have said if he had been asked whether Congress, under the Confederation had, or under the Constitution, was to have, an unlimited power to raise money to free the slaves in the several States? He would have said— "Slavery is a local matter, Congress cannot control it directly or by the use of money. The powers of the Confederation did not extend to slavery— it was not part of the common defence or general welfare and the same is true under the Constitution."

10. DEBATES IN FEDERAL CONVENTION SUPPORT MADISON'S INTERPRETATION

(a) Hamiltonian Doctrine Not Considered.

In the early meetings of the Convention the discussion was confined to the principles of the Virginia resolutions. There is not in all this discussion any mention of any such right as Hamilton subsequently contended for.

Proposals were made to give the Federal Government more power than was ultimately granted it by the Constitution as adopted. Hamilton went farther than others and proposed that the Congress should have power, subject to Executive veto to "pass all laws whatsoever", and all state laws contrary thereto were to be void, which of course was not accepted (*Debates in the Federal Convention of 1787* by James Madison, Hunt & Scott ed., pp. 118, 119.)

There was, however, in the course of the Convention, no suggestion whatsoever of giving the Federal Gov-

ernment power to appropriate money for objects outside the field of federal power, which constitutes the Hamiltonian doctrine.

(b) Account of Proceedings.

On July 24th although the Convention had not quite finished its discussion of general principles, a committee of five was "appointed to report a Constitution conformably to the resolutions passed by the Convention." The committee reported its draft of the Constitution on August 6. (*The Debates in the Federal Convention of 1787* by James Madison; Hunt & Scott, editors, p. 337.) In this draft the taxing clause was contained in Article VII, Section 1, as follows:

> "The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises; . . . . " (*Idem.*, p. 340).

Under the provisions of this clause Congress clearly would have been limited to taxing for the fulfilment of the powers entrusted to it, as it would have been clearly implied that the power to tax was in aid of and for the purpose of enabling the United States to accomplish the purposes for which it was formed and the powers confided to it.

In the discussion preceding the adoption of this provision, on August 16, Mr. Carroll expressed doubts as to the propriety of a mere majority of Congress being a quorum, on account of the difference of interest among the States (*Idem.*, p. 410). Mr. Mason urged that the provision in Section 4 of Article VI of the draft of Constitution, forbidding a tax on exports, be made a part of the taxing clause which authorized the levying of taxes. He proposed an amendment of the taxing power

to this effect. *Ibid.* Considerable discussion ensued as to whether exports ought to be taxable by Congress. It was finally decided that consideration of the clause prohibiting taxes on exports be postponed until the clause should be reached in the place in which it stood in the report. Section 1 was then agreed to, Mr. Gerry alone voting no (*Idem.*, p. 412).

The Discussion related to the payment of the existing debts of the Confederation and of the States.

On August 18 the question of the payment of the debts of the Confederation and of the debts of the States incurred in the Revolution was brought up for consideration.

Both the securities of the Confederation and of the States were selling for a small portion of their par value. The Articles of Confederation provided, as shown above, that "all charges of war and other expenses incurred for the common defence or general welfare and allowed by the United States in Congress assembled should be defrayed out of a common treasury to be supplied by the several states."

The Confederation, therefore, had the right and duty to care for the State debts incurred for these purposes but as the States refused to pay their allotments, no settlement with the States could be made by the Confederation. As the debts of the States were not proportionately equal, some of the States would have necessarily supplied funds to pay the debts of others.

A substantial part of the public debts of the States and the United States was held by speculators or others who had bought them at a big discount. ". . . unmerited misfortune and patriotic distresses," said John Jay,

"became articles of speculation and commerce." (Paul Leicester Ford, *Pamphlets on the Constitution,* p. 71.)

Public opinion as to how to deal with this situation was divided. Some were for repudiation. Some were for payment on a basis which would give holders the amounts only they had paid for the securities. Some were for full payment but for dividing the proceeds among the original holders who had given full value and the purchasers who had bought at a discount. Others, of course, strenuously advocated full payment to the holders at face value.

The Convention showed a division of opinion.

On August 18 Mr. Gerry

> "remarked that some provision ought to be made in favor of public Securities, and something inserted concerning letters of marque, which he thought not included in the power of war. He proposed that these subjects should also go to a Committee." (*Idem.* p. 421.)

Gerry's motion was later on the same day, committed, *nem. con.,* to the Committee of Detail (*Idem.,* p. 422).

Mr. Rutlidge moved

> "that a Grand Committee be appointed to consider the necessity and expediency of the U. States assuming all the State debts. A regular settlement between the Union & the several States would never take place. The assumption would be just as the State debts were contracted in the common defence. It was necessary, as the taxes on imports the only sure source of revenue were to be given up to the Union. It was politic, as by disburdening the people of the State debts it would conciliate them to the plan." (*Ibid.*)

Mr. Sherman

"thought it would be better to authorize the Legislature to assume the State debts, than to say positively it should be done. He considered the measure as just and that it would have a good effect to say something about the Matter."

Mr. King

"thought the matter of more consequence than Mr. Elseworth seemed to do; and that it was well worthy of commitment. Besides the considerations of justice which had been mentioned, it might be remarked that the State Creditors an active and formidable party would otherwise be opposed to a plan which transferred to the Union the best resources of the States without transferring the State debts at the same time. The State Creditors had generally been the strongest foes to the impost-plan. The State debts were probably of greater amount than the federal. He would not say that it was practicable to consolidate the debts, but he thought it would be prudent to have the subject considered by a Committee."

It was voted that the committee be appointed to consider the assumption in accordance with Mr. Rutlidge's motion. (*Idem.*, p. 422.)

A Committee of eleven, one from each state, was thereupon appointed to consider the matter. (*Idem.*, p. 423.)

On August 21, Livingston for the Committee of Eleven proposed the following:

"The Legislature of the U.S. shall have power to fulfil the engagements which have been entered into by Congress, and to discharge as well the debts of the U. S. as the debts incurred by the several States during the late war, for the common defence and general welfare."

This is the first introduction of the words "common defence and general welfare" in connection with the taxing power. It is most important to note the sense in which the words are used. By Article VIII of the Articles of Confederation the United States was to pay the expenses and debts of the States "incurred for the common defence or general welfare."

In the August 21 resolution we have the words used merely to define the debts of the United States, that is, its own direct debts, and the States' expenses it had agreed to pay, viz., those incurred by the States for the common defense or general welfare.
It was agreed nem. con. that the report should lie on the table. (*Idem.*, p. 436.)

On August 22 a discussion of this proposed provision occurred.

> "Mr. Ellsworth argued that the provision was unnecessary. The U. S. heretofore entered into Engagements by Congs. who were their agents. They will hereafter be bound to fulfil them by their new agents."
>
> "Mr. Randolph thought such a provision necessary: for though the U.S. will be bound the new Govt. will have no authority in the case unless it be given to them."
>
> "Mr. Madison thought it necessary to give the authority in order to prevent misconstruction. . . ."
>
> "Mr. Gerry thought it essential that some explicit provision should be made on this subject so that no pretext might be made for getting rid of the public engagements."
>
> "Mr. Govr. Morris moved by way of amendment to substitute,

> "'The Legislature *shall* discharge the debts & fulfil the engagements of the U. States.'
>
> "This amendment was agreed to all the states being in the affirmative." (*Idem.*, pp. 450-451.)

On the same day, August 22, the Committee of Detail, of which Rutlidge was Chairman, reported on several matters. Among them was Gerry's proposal to provide for public securities. The Committee reported that, in their opinion, the following addition should be made to the report [*i.e.*, the draft of the Constitution] now before the Convention, namely,—

> "At the end of the first clause of the first section of the seventh article add, 'for the payment of the debts and necessary expenses of the United States, provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than —— years.'" (*Idem.*, p. 448.)

The consideration of the report was postponed (*Idem.*, p. 450), and was not acted on until August 31, when it was referred to the Committee on Unfinished Portions (*Idem.*, p. 502).

In the period between August 22 and August 31, further action was taken on the proposal of the Committee of Eleven, as amended on Govr. Morris' motion.

On August 23 the clause as so amended was agreed to, but—

> "Mr. Butler expressed his dissatisfaction lest it should compel payment as well to the Bloodsuckers who speculated on the distresses of others, as to those who had fought & bled for their country. He gave notice that he should move for a reconsideration." (*Idem.*, p. 457.)

On August 24 he again moved that the provision be reconsidered the next day. "He dwelt on the division of opinion concerning the domestic debts, and the different pretensions of classes of holders." (*Idem.*, p. 460.)

On August 25 the clause was reconsidered. It was objected by Col. Mason that the term "shall" will beget speculations; that there was a great distinction between original creditors and those who purchased fraudulently of the ignorant and distressed. . . . (*Idem.*, p. 465.)

After further debate—

Mr. Randolph "moved to postpone the clause in favor of the following

'All debts contracted & engagements entered into, by or under the authority of Cong. shall be as valid agst. the U. States under this Constitution as under the Confederation.'" (*Idem.*, p. 466.)

After further debate the Randolph motion was adopted, only Pennsylvania voting in the negative. (*Idem.*, p. 467.)

The provision was ultimately incorporated in the Constitution, as the first clause of Article VI. (*Idem*, p. 553.)

Immediately after the vote on Randolph's motion was taken on August 25—

> "Mr. Sherman thought it necessary to connect with the clause for laying taxes duties &c an express provision for the object of the old debts, &c—and moved to add to the 1st clause of 1st. sect. art VII 'for the payment of said debts and for the defraying of expenses that shall be incurred for the common defence and general welfare.'
>
> "The proposition, as being unnecessary, was disagreed to, Connecticut alone, being in the affirmative." (*Ibid.*)

On August 31 it was agreed to "refer such parts of the Constitution as have been postponed and such parts of reports as have not been acted upon to a committee consisting of one member from each state appointed by ballot." This was the so-called "Committee on Unfinished Portions," previously referred to.

To this Committee, accordingly, was submitted the report of the Committee of Detail on Gerry's motion to provide for the public securities which had remained unacted on since August 22.

On September 4 this committee reported the taxation and welfare clause substantially as it now stands*† and *it was agreed to nem. con., without debate,* and there was no further discussion of it in the records.

(c) Conclusions to be Drawn.

The above record is of the greatest importance for the following reasons:

First. It shows that under the provision in the original draft of the Constitution there was only an authority to tax which would clearly have limited taxation to provid-

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*NOTE: The wording was—

"The Legislature shall have power to lay and collect taxes, duties, imposts & excises, to pay the debts and provide for the common defence & general welfare, of the U.S." (*Idem.*, p. 507.)

†NOTE: The uniformity clause was added in convention on September 14 (*Idem.*, p. 563). "Legislature" was changed to "Congress" in the report of the Committee on Stile (*Idem.*, p. 548). This report of the Committee on Stile shows a semi-colon (;) (instead of a comma (,)) after "excises," which had not appeared in the clause as adopted on September 4 and did not in the Constitution as adopted by the Convention (*Idem.*, p. 630). *Cf.* Remarks of Albert Gallatin, June 19, 1798, in Congress (*Annals of Congress, 5th Congress*, Vol. 2, p. 1976). Madison referred to the semi-colon as in the Committee's on Stile's report as "an erratum of the pen or of the press." (Letter to Stevenson, November 17, 1830, Farrand, *Records of the Federal Convention*, Vol. III, pp. 483, 492.) *Cf.* also, Henry St. George Tucker, in *American Bar Association Journal*, Vol. 13, pp. 363, 465, 468.

ing funds for the accomplishment of the powers granted Congress.

Second. It shows that the welfare clause was adopted without any debate or objection or without any intimation that it granted the enormous powers now contended for, in spite of the fact that Madison and also Williamson, who a few years later so strongly denounced the right as defeating the intention and restrictions imposed in the Constitution (*supra,* pp. 89-91), were present when it was adopted.

It shows a tacit and unquestioning assumption on the part of the delegates that Federal money was to be spent for Federal objects and for those alone. The unanimity of the Committee that reported the general welfare clause and the entire absence of any request by any delegate for an explanation of the meaning of the words, or of any objection or protest, are wholly persuasive. The words had a definite and well understood meaning in the Articles of Confederation; no one even dreamed that they would afterwards be twisted into the interpretation which Hamilton subsequently sought to place upon them. There was not even a suspicion that such a construction could be placed upon the words; if there had been, can it be for one moment supposed that the Southern delegates would have remained silent? Can it be supposed that Madison, Williamson, Butler and Baldwin—all of whom were on the Committee on Unfinished Portions, and all of whom subsequently disagreed with Hamilton's interpretation—would have concurred in the report of the Committee which added the welfare clause to the taxing clause? Hamilton's subsequent interpretation was ingenious; but it was so far from the real thought in the minds of the delegates at the time the

Constitution was being debated, that it did not even occur to them. The fact that there was not even a question made about it shows how utterly foreign Hamilton's interpretation was to what was in the minds of the delegates.

The debates of the Convention between August 6th and September 4th are replete with evidence of the economic division of interests between the States, of the zeal and energy with which the delegates from each State undertook to espouse the cause of their respective constituents. The debate over the number of representatives; (*Debates in the Federal Convention of 1787* . . . . by James Madison, Hunt & Scott, Editors, page 358 *et seq.*); on entrusting the Senate with the power of originating money bills; (*Idem.*, page 388, 395); upon the militia; (*Idem.*, page 425, 452, 453); concerning the right of Congress to tax exports; (*Idem.*, page 439 et. seq.); concerning the prohibition of the slave trade; (*Idem.*, page 442 et seq.); the debate over the compromise involving the restriction of the slave trade and the elimination of the two-thirds requirement for the passage of Navigation Acts; (*Idem.*, page 483 et seq.);—all these demonstrate the conflict of interests which at times threatened to be irreconcilable. The power of Federal taxation was subjected to the closest scrutiny, and restrictions upon the taxing power were the result of a studied design to prevent inequality in taxation. *Hylton* v. *United States*, 3 Dallas, 171, 177; *Pollock* v. *Farmer's Loan & Trust Co.*, 157 U. S. 429, 563, 564, 587, 588; *Knowlton* v. *Moore*, 178 U. S. 41, 95, 96. Butler of South Carolina considered the interests of the Southern and of the Eastern States "to be as different as the interests of Russia and Turkey." (*Idem.*, pp. 484, 485.) Pinkney of South Carolina mentioned five

distinct commercial interests, and alleged that "these different interests would be a source of oppressive regulations if no check to a bare majority should be provided." (*Idem.*, page 483.) A power over exports, said Gerry of Massachusetts, "will enable the Genl. Govt. to oppress the States as much as Ireland is oppressed by Great Britain." (*Idem.*, page 440), and the same power Butler declared to be "unjust and alarming to the Staple-States." (*Idem.*, page 439.) Is it not significant that while so many provisions evoked storms of dissension and debate, the general welfare clause created not even a ripple of comment or inquiry?

Third. The reason for the adoption of the clause is clearly shown.

Those desiring that the Constitution should provide that the old debts "*shall* be paid" were defeated on Aug. 25, it being thought by the majority wiser merely to provide that the old obligations should be obligations of the new government without providing that the new government must necessarily care for them, or in what form, thus leaving this disputed question as to the manner in which these obligations should be cared for to later determination.

Sherman on August 25, immediately after the vote striking out the mandatory clause requiring the payment of the old debts insisted that it be shown in the taxing clause, that taxes could be levied for the payment of such debts, presumably so that no one would seek to avoid the responsibility of payment by contending that the authority to raise the money by taxation to pay them was not explicitly granted. He asked in order that there should be no doubt in the matter that the taxing clause

contained in Article VII, Section 1, be amended to read as follows:

> "The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises for the payment of said debts and for the defraying of expenses that shall be incurred for the common defence and general welfare."

His sole purpose was to make clear that Congress could levy taxes to pay the old debts which, by the separate action which had immediately before been adopted by the Convention, it was provided should be valid against the new government. The purpose of suggesting the addition of the phrase relating to defraying of expenses, etc., after "said debts" was to prevent a limitation of the taxing power to payment of debts and in suggesting it Sherman had not the slightest notion that he was adding the grant of vast power to the United States now contended for. Sherman was subsequently a member of the Committee on Unfinished Portions which reported the general welfare clause in the form adopted, and presumably brought up in the Committee the substance of his motion of August 25 which had been defeated and secured the consent of the Committee to report it with certain verbal alterations. The recommendation of the Committee of Eleven—"for the payment of the debts and necessary expenses of the United States,"—Sherman's motion,—"for the payment of said debts and for the defraying of the expenses that shall be incurred for the Common defence and general welfare,"—and the provision reported by the Committee on Unfinished Portions—"to pay the debts and provide for the Common defence and general welfare, of the U. S.,"—all meant practically the same thing. The

real concern, as the debates show, was with respect to payment of the old debts.

Fourth. The reason for the addition of the words "for the common defence and general welfare" is self-evident. Had the provision read that Congress might "lay and collect taxes, etc. for the payment of the debts", the question would have immediately arisen as to whether Congress could lay taxes for any other purpose. It was obviously essential to add some other phrase showing that it could also levy taxes to carry out its other powers.

Under the Articles of Confederation, Congress was given the power to collect from the States all expenses incurred "for the common defence or general welfare". These words, as Madison has said, had been understood as only authorizing Congress under the Articles of Confederation to raise money for the purposes which it undertook to control. To use Madison's own words,

> "The similarity in the use of these phrases, in the two great federal charters, might well be considered as rendering their meaning less liable to be misconstrued in the latter; because it will scarcely be said, that in the former, they were ever understood to be a general grant of power, or to authorize the requisition or application of money by the old Congress, to the common defense and general welfare, except in cases afterward enumerated, which explained and limited their meaning; and if such was the limited meaning attached to these phrases in the very instrument revised and remodelled by the present Constitution, it can never be supposed that when copied into this Constitution, a different meaning ought to be attached to them." (*Report on the Virginia Resolutions,* Elliot's *Debates,* 2nd ed., Vol. IV, p. 551.)

While the Convention had voted that it was unnecessary to adopt Sherman's suggestion since the power to raise money to pay the old debts, which had been expressly stated to be obligations of the new government, was necessarily implied, it seems obvious that the words, as Sherman suggested, would add some emphasis, just as the Tenth Amendment later added emphasis, to the reservation of powers to the States. Since those who strongly urged that the payment of the debts be made mandatory had been defeated, it seemed a slight concession to insert the suggestion made by Sherman which was in line with Gerry's previous motion of August 11 that provision be made for the public securities, and the recommendation of the committee of eleven. While the mandatory provision had been defeated the Committee on Unfinished Portions took this opportunity to adopt Sherman's suggestion and make this slight concession.

(d) Evidence of Sherman's Speech on the Proposed Glass Manufactory Loan.

That Sherman had not the slightest idea of introducing into the Constitution a provision which should empower Congress to apply money for purposes concerning which they were not authorized to legislate, is confirmed by his attitude on the proposal that the Secretary of the Treasury of the United States be authorized to make a loan of not exceeding $8000. to one Amelung to aid him in maintaining his "American Glass Manufactory" which was considered by the First Congress under the Constitution, of which Sherman was a member.

On June 3rd, 1790 the proposal was debated and defeated.

> "Mr. Smith, of South Carolina, and Mr. Sherman, objected to the report of the committee. They doubted the Constitutionality of the power of Con-

gress to loan money to their constituents; they objected to it on account of the precedent it would establish, and supposed that the encouragement and assistance would be applied for with more propriety to the State Government." (*Annals of Congress; 1st Congress;* Vol. 2, page 1630.)

And later in the debate

"Mr. Sherman read that part of the Constitution which he conceived was contrary to the proposition in the report." (*Idem.,* p. 1631.)

11. HAMILTON'S DOCTRINE WAS NOT AN ISSUE IN THE CAMPAIGN FOR RATIFICATION OF THE CONSTITUTION.

The ingenious theory of Constitutional interpretation, that while the Federal Government was one of enumerated powers, and those powers could not be exceeded, yet nevertheless Congress might apply money in furtherance of objects over which it had no power of regulation and control, was still unborn during the struggle over the ratification of the proposed Constitution. The occasion had not yet arisen which was to cause it to germinate in Hamilton's resourceful brain. The battle over ratification was fought along a broad front, and with considerable bitterness, as was natural, considering the sharp cleavage of economic and social forces. The contest was exceedingly close. Consolidation, and tyranny, it was predicted, would result if the Constitution were adopted. "Centinal" claimed that they had entirely annihilated the old Confederation and the particular governments of the several States, and instead had established—

". . . . one general government that is to pervade the union; constituted on the most *unequal* principles, destitute of accountability to its constituents, and as despotic in its nature, as the Venetian Aris-

tocracy. . . . ." (McMaster & Stone, *Pennsylvania and the Federal Constitution,* page 595.)

It would be absurd to accept this interpretation of the Constitution, or the other extravagant claims which were made with respect to the probable effect and operation of various clauses, including the taxing clause. Prejudice distorted the purpose of the Constitution and read a sinister intention in every clause.

It is rather to the temperate and scholarly exposition of the *Federalist* that we should look for the meaning intended to be attached to the Constitution by its framers, and from this we have seen, that Madison interpreted the general welfare clause (and in this interpretation Hamilton, as his collaborator, *at that time presumably agreed*) as being explained and qualified by the subsequent enumeration.

It is true that Madison was not considering the Hamiltonian doctrine—there was then no Hamiltonian doctrine to consider—but Madison's exposition is clearly applicable to the Hamiltonian doctrine and was subsequently applied by Madison to the Hamiltonian doctrine. The power of taxation was a focus of opposition, but the particular interpretation subsequently attached to the general welfare clause by Hamilton was not discussed. It is true, that instances may be found in which the opponents of ratification claimed that under the general welfare clause Congress might legislate as to any matters it saw fit and of course make expenditures therefor. But no one made the distinction that Congress would have the right to appropriate money for purpose with respect to which it was forbidden to legislate, which was later advanced by Hamilton.

The real issues of the campaign, with respect to taxation, were whether Congress ought to have the taxing

power at all, or whether the power granted was too extensive as respects the methods and objects of taxation; whether it would operate unjustly as between States (*Cf.*, Oliver Ellsworth in Connecticut. Government's brief, appendix, pages 34, 35), whether it would divest the States of the power to tax for their own welfare.

The position of the advocates of ratification was that the power of taxation was necessary because the futility of the requisition system had been shown by the experience under the Confederation. In the second place a power to lay a tariff duty alone, to which it was suggested it be limited, was not sufficient because, while it might suffice in times of peace, in the event of a foreign war, cutting off commerce, revenue would fail and the Government credit with it, and the Government would be unable to provide for the national defense. Direct taxes and excises must be at the command of government; the power of taxation should be commensurate with the objects of the Government. Any limitation, therefore, as to the character of property on which taxes might be levied, or upon the amount which might be raised, would be likely to lead to repetition of the futility of the Confederation. "Every power," said Hamilton, "ought to be in proportion to its object. . . ." (*Federalist*, No. XXX.) As there was no way of telling how much money would be needed to defend the country in case of war, it was folly to place a limitation upon the power of the Government to raise money for this purpose. But there is no suggestion by the advocates of ratification that the Federal Government should have power to raise money to apply to matters which the Federal Government was not constituted to control; on the contrary, the implication is that if the power is to be proportioned to the objects, it does

not exist where there are no objects to which to attach itself.

It was freely admitted by the advocates of ratification that Congress had power to tax for the general welfare. And why not? General welfare under the Confederation meant the attainment of those general objects which the Confederation was organized to accomplish; it did not include matters which were "expressly reserved" to the States. By putting ourselves in the position of a citizen of a State whose principal interests were safeguarded by the State, and who in respect to a few matters, relating principally to national defense, looked to the Congress of the Confederation for protection, we plainly see that the term "general welfare" had a limited meaning, bounded by the powers of the Confederation. Of course if the new government were to be given greater powers, then general welfare would have a wider application.

Those who explained that the Federal Government should have an unlimited power to raise money, meant an unlimited power to raise money for the objects of the Federal Government. We submit that, carefully examined, there is not in the quotations collected by the Government a single statement made therein to the adoption of the Constitution which expresses the doctrine subsequently formulated by Hamilton.

Among the numerous amendments proposed to the Constitution, none related to the general welfare clause. Madison's explanation, and similar expositions, presumably set at rest fears that it conferred an unlimited power to legislate. Had the suggestion been seriously made, or taken seriously, that the Federal Government could tax not only for its own purposes, but for State purposes as well—could do all that money could do to enlarge and extend its sphere of influence,—some

action would have been taken toward amendment. It remained for Hamilton, a few years later, to evolve this novel doctrine, and by his prestige and influence, to give it an air of respectability.

12. AN ADDITIONAL REASON FOR ACCEPTING MADISON'S VIEW IS HIS PREEMINENT QUALIFICATIONS.

Madison was better qualified than any other member of the Constitutional Convention to give a correct interpretation of the intent of the members of the Convention as to the meaning of the Constitution.

He was the first to propose that the States meet to consider commercial relations which resulted in the Annapolis Convention of 1786 and the call for the Constitutional Convention. He was a student and had devoted himself to the study of principles and systems of government. He had a large responsibility for the Virginia Plan which formed the basis for the Constitution. He took a leading part in the debates in the Convention. He was the only person to take full notes of the debates.

Moreover he was not at the time prejudiced against a strong central government. He considered that "the individual independence of the States was irreconcilable with their aggregate sovereignty, but that the unification of the whole into one single republic would be as inexpedient as it was unattainable." (Letter to Washington, April 16, 1787. Madison's *Works,* published by order of Congress, Vol. I, p. 287.) He believed that a practical compromise was the system of dual sovereignties which was adopted, but he considered that it was "absolutely necessary to a perfect system" that the United States have the right to negative the laws passed by the States (*Debates in the Federal Convention of 1787* . . . by James Madison, Hunt & Scott ed., p. 75).

Throughout a distinguished career devoted to the public service, Madison was steadfastly of the opinion that the general welfare clause did not give Congress power to legislate, or to appropriate money, for purposes outside of the scope of the subsequently enumerated powers. His opinion in the 41st number of the *Federalist* related to the objection that Congress might assume to exercise an unlimited power of legislation, but the reasoning is equally applicable to the narrower claim. His speech on the Bank Bill in 1791, (*Annals of Congress,* First Congress, pages 1896-1897) also related to the claim of power. But after Hamilton had announced the new doctrine in December of 1792, Madison denounced it in a letter written to Edmund Pendleton in the following month, (*Letters and writings of James Madison,* published by order of Congress, Volume I, page 545), and within a fortnight in the debate on the Codfisheries Bill, elaborated his views in opposition. (*Annals of Congress,* Second Congress, pages 386-388.) He again indicated the same point of view in the Third Congress in the debate over the Bill for the Relief of Refugees from San Domingo. (*Annals of Congress,* Third Congress, pages 170, 171.) The Virginia Resolutions, which are attributed to Madison, deplored the tendency to enlarge the powers of the general government by forced construction, so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases, and so as to consolidate the States by degrees into one sovereignty. (*Federalist.* Ford's Edition, page 685.)

In the following year Madison's report on the Virginia Resolution in the Virginia House of Delegates, dealt at length with the general welfare clause and with

the alternative alleged powers sought to be derived from it by forced construction. (*Elliot's Debates*, Second Edition, Volume IV, page 551 et seq.)

When the matter came before him as Chief Executive he acted upon his opinion by vetoing the Bank Bonus Bill. (Richardson. *Messages and Papers of the Presidents*, Volume I, page 584.)

After Monroe became President, Henry St. George Tucker sent to Madison a copy of the report on roads and canals, upon which the Government relies in its brief. (Page 150.) In reply Madison said,

> "I must pray you, my dear sir, to be assured that, although I cannot concur in the latitude of construction taken in the Report, or in the principle that the consent of States, even of a single one, can enlarge the jurisdiction of the General Government, or in the force and extent allowed to precedents and analogies introduced into the Report, I do not permit this difference of opinion to diminish my esteem for the talents, or my confidence in the motives, of its author."
>
> (*Letters and Other Writings of James Madison.* Published by order of Congress. Volume III, page 54.)

In a letter to President Monroe about the same time, (December 27th, 1817) he says

> "Serious danger seems to be threatened to the genuine sense of the Constitution, not only by an unwarrantable latitude of construction, but by the use made of precedents which cannot be supposed to have had in the view of their Authors the bearing contended for, and even where they may have crept through inadvertence into acts of Congress, and been signed by the Executive at a midnight hour, in the midst of a group scarcely admitting perusal,

and under a weariness of mind as little admitting a vigilant attention.

"Another, and perhaps a greater danger, is to be apprehended from the influences which the usefulness and popularity of measures may have on questions of their constitutionality. It is difficult to conceive that any thing short of that influence could have overcome the constitutional and other objections to the Bill on roads and canals which passed the two Houses at the last session." (*Idem.*, page 56.)

And finally in his celebrated letter to Andrew Stevenson, (*Letters and Other Writings of James Madison*, published by order of Congress, Volume IV, page 121 *et seq.*) Madison reiterated his opposition to both the broader and the narrower view.

13. HAMILTON'S INTERPRETATION WAS ORIGINATED BY HIM FROM MOTIVES OF EXPEDIENCY, AFTER THE CONSTITUTION WAS ADOPTED.

A candid student of the period is inevitably led to the conclusion that the interpretation advocated by Hamilton was inspired by political expediency or an attempt to make the central government stronger than the Convention which formulated it or the people who adopted it were willing to concede.

Hamilton himself apparently attended only the early and final meetings of the Convention and was not present when this clause was debated and adopted. He had little sympathy with the limitations placed upon the powers of the central government. At the last meeting in fact he said,

"No man's ideas were more remote from the plan than his own were known to be; but is it possible to deliberate between anarchy and Convulsion on one

side, and the chance of good to be expected from the plan on the other?'' (*Debates in the Federal Convention of 1787* . . . by James Madison, Hunt & Scott ed., p. 581.)

Gouv. Morris wrote:

''General Hamilton had little share in forming the Constitution. He disliked it, believing all Republican government to be radically defective.'' (Jared Sparks' *Life of Gouv. Morris,* III, 260-265; Farrand, *Records,* III, 418-419.)

On becoming Secretary of the Treasury he immediately sought in every way to draw to the government as much power as possible and the support of the moneyed classes. He was an executive and the opinions he advanced as to the meaning of the Constitution were not judicial but those of an executive seeking to accomplish his purposes.

When he published his famous Report on Manufactures in 1791 he believed that by suggesting bounties to aid manufacture he could draw manufacturers to the support of the central government as he had drawn the moneyed classes by his insistence on the payment of the old Federal and State debts.*

Madison later, accounting for the breach between himself and Hamilton, said it was due to Hamilton making perfectly plain

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*NOTE: Professor Channing says,

''Not being able to secure a 'strong government' through the Federal Convention, Hamilton was gradually building up such an organization by a liberal interpretation of the Constitution and by executive action.'' (*History of U. S., IV,* p. 162.)

''It was undoubtedly Hamilton's purpose to draw men of wealth and property to the support of the government by means of his financial measures.'' (Woodrow Wilson, *History of the Am. People,* Vol. III, p. 110.)

"his purpose and endeavor to *administration* the Government into a thing entirely different from that which he and I both knew perfectly had been understood and was intended by the Convention who framed it and by the people adopting it." (Edward Channing, *History of the U. S.* (*Letter, Trist to Van Buren*), IV, 162.)

Both Madison and Jefferson regarded Hamilton's doctrine not only as wrong, but also as *new*. Shortly after the Report appeared, Madison in his letter to Edmund Pendleton on January 21, 1792 said that the Report—

"'. . . broaches a new constitutional doctrine of vast consequence, ... I consider it myself as subverting the fundamental and characteristic principle of the Government; as contrary to the true and fair, as well as the received construction, and as bidding defiance to the sense in which the Constitution is known to have been proposed, advocated, and adopted. . . .'" (*Letters and Other Writings of James Madison,* published by order of Congress, Vol. I, pp. 545, 546.)

Shortly afterwards Jefferson in a conference with the President said,

"That it was a fact, as certainly known as that he and I were there conversing, that particular members of the Legislature . . . had from time to time aided in making such legislative constructions of the Constitution as made a very different thing from what the people thought they had submitted to; that they had now brought forward a proposition far beyond every one ever yet advanced, and to which the eyes of many were turned, as the decision was to let us know whether we lived under a limited or unlimited government. He asked me to what pur-

poses I alluded? I answered, to that in the report on manufacture, which, under color of giving *bounties* for the encouragement of particular manufactures meant to establish the doctrine that the power given by the Constitution of the United States to collect taxes to provide for the general welfare of the United States permitted Congress to take everything under their management which *they* should deem for the public welfare, and which is susceptible of the application of money; consequently, that the subsequent enumeration of their power was in the discretion to which resort must be had and did not at all constitute the limits of their authority; that this was a very different question from that of the bank which was thought an incident to an enumerated power." Jefferson's *Works*, IV 457.)

The interpretation of the general welfare clause which Hamilton suggested for the first time after the adoption of the Constitution and while he was Secretary of the Treasury was at least strongly colored by his desire to enforce his views of what the Constitution should have been and is entitled to little weight.

We submit that the following statement in Madison's letter of November 27, 1830 to Speaker Stevenson was fully justified.

"That the terms in question were not suspected in the Convention which formed the Constitution of any such meaning as has been constructively applied to them may be pronounced with entire confidence." (Max Farrand, *Records of the Federal Convention*, Vol. III, pp. 483, 492.)

14. THE GOVERNMENT'S CONTENTION, THAT HAMILTON'S DOCTRINE WAS ADOPTED BY EARLY CONGRESSES, IS NOT SUPPORTED BY THE HISTORICAL EVIDENCE.

The Government contends that the Hamiltonian construction was adopted by the weight of contemporaneous opinion and by the early Congresses, and that "the practice of the earlier Congresses . . . has been uniformly followed by Congress and the Executive branch of the Government."

(a) Story's statement as illustrating a common misconception.

This statement by the Government we submit is wholly erroneous. It is a common misconception, based in large part on the statement by Mr. Justice Story, in his *Commentaries on the Constitution,* published in 1833, which was for long the standard and practically the only text book on the Constitution. We quote this passage in full, because it states specifically the precedents which it contends justify the conclusion, and we shall show below that, probably due to the fact that the debates in Congress were not published at the time these *Commentaries* were written, Story misconceived the importance and bearing of the so-called precedents.

Mr. Justice Story says (Vol. I, pp. 727-728)

> "In regard to the practice of the government, it has been entirely in conformity to the principles here laid down. Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or their narrow sense. And in an especial manner appropriations have been made to aid internal improvements of various sorts, in our roads, our navigation, our streams, and other objects of a national character and importance. In some cases, not silently, but upon discussion, Congress has gone the length of

making appropriations to aid destitute foreigners and cities laboring under severe calamities; in the relief of the St. Domingo refugees, in 1794, and the citizens of Venezuela, who suffered from an earthquake in 1812. An illustration equally forcible of a domestic character, is in the bounty given in the cod-fisheries, which was strenuously resisted on constitutional grounds in 1792, but which still maintains its place in the statute-book of the United States."

In respect to opinion and discussion by Congress and the executive branch of the Government after the adoption of the Constitution, the statement by Story and others that the Hamiltonian view was adopted generally as the proper interpretation of the Constitution and was so acted upon is without foundation. In fact, the reverse is true. There has always been opposition to this doctrine; there is not a clear-cut case of legislation in Congress adopting this view until long after Congress ceased to contain any person who had participated in public affairs at the time of the adoption of the Constitution or who was a member of the Constitutional Convention. In fact, there is not a clear-cut case which can be relied upon as showing any general acceptance of the doctrine until after the Civil War, and even then there was strong opposition.

(b) General principles applicable to evaluating legislative precedents.

In considering legislative precedents, three points are to be borne in mind.

(1) Where the construction of the Constitution is plain, no contemporary or other extraneous opinions or action by Congress or the executive branch is material. We believe the wording of the general welfare clause is sufficiently clear so that consideration of such outside opinion and practice is not permissible.

(2) In cases of doubtful construction, *contemporary* opinion is valuable because it expresses the views of those acquainted with the purposes of the framers of the Constitution. Especially is the action of the first few Congresses important, since they not only were composed of men living contemporaneously with the adoption of the Constitution, but also among the members were men who had been also members of the Constitutional Convention and who may be assumed to have understood its intention. Such contemporaneous opinion is of real value only when it is accepted by both opponents and proponents of legislation; that is when it meets with common assent. In such cases, especially where the view also receives judicial approval, it has persuasive if not conclusive force.

Thus, in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351-352, Mr. Chief Justice Marshall said,

> "It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system."

He then states that the Supreme Court has many times sustained this jurisdiction and adds,

> "This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state

courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts."

In *Cohens* v. *Virginia*, 6 Wheat. 264, 420, Mr. Chief Justice Marshall in speaking of the validity of the Judiciary Act said that it was adopted by a Congress containing many members of the Convention which framed the Constitution and "not a single individual, so far as is known, supposed that part of the act . . . to be unauthorized by the constitution."

In the present case, as we shall show, not only was there not common consent as to the correctness of the Hamiltonian view but there was the most violent opposition voiced in Congress, and there is not a single act in the early Congresses which constitutes a precedent. In fact the action of Congress, we submit, proves that the Hamiltonian view was opposed in all the early Congresses and not adopted by any.

As to later action by Congress, it carries little weight. It does not indicate the view of the framers of the Constitution. Unless adopted without dissent and unless there has been opportunity to test it in the courts, it has no persuasive force. Otherwise, Congress by its own action could amend the Constitution.

Abraham Lincoln said that it was a great truth, greatly uttered when John C. Calhoun stated in the Senate that "to legislate upon precedents is but to make the error of yesterday the law of today." (Charles Warren; *Congress as Santa Claus*, p. 12. Carl Sandburg; *Abraham Lincoln, The Prairie Years*, p. 489.)

Where no suit can be brought to test the constitutionality of legislation, it can carry no or little weight as a precedent. Since a citizen can not litigate the legality of

an appropriation by Congress out of the general treasury, as was held in *Massachusetts* v. *Mellon*, 262 U. S. 447, and as such appropriations heretofore have generally been made from the general treasury and no taxes have been levied, as in the present case, for the express purpose of so disbursing them, the question heretofore could not be raised unless raised by the Government itself in denying its own right to act under such laws. In *United States* v. *Realty Company*, 163 U. S. 427, the question was sought to be raised in this manner but the court held that the payment was for a "debt" and therefore it was unnecessary to determine the question. There has been no other opportunity to present it to this court.

The precedents are for the most part quite recent,—practically all of them since the Civil War, and most of them only in the last thirty years. There has always been opposition. These precedents, as stated, carry no weight.

See *Myers* v. *United States*, 272 U. S. 52, 171.

See also *Fairbank* v. *United States, supra*, in which the court set aside a construction of the Constitution which had been adopted by Congress first from 1799 to 1801 and again from 1862 to 1872, and finally by a statute of 1898.

(c) Reasons for this common misconception as to the precedents.

Before taking up the alleged precedents themselves, we wish to consider briefly what caused this common misconception in respect to the practices of Congress. It was due to a number of causes.

The first and principal reason was the fact that there was in the early Congresses no common understanding as to the powers granted Congress. The broad scope of these powers, the right of the United States to use any and all means appropriate to carry them out, and the doctrine of implied powers had not been settled or agreed

upon. The decisions of Marshall, and later decisions, which determined and defined the scope of the implied powers and laid down the principle that a real nation was established with full power to do what was necessary to provide for foreign and interstate commerce, navigation, and the other matters committed to its charge, all lay in the future.

The result was that there was great confusion and dispute as to what might be done under the express powers granted Congress. It was easy, therefore, to contend that Congress had made appropriations for matters in excess of its powers when in reality such was not the case. Thus, it was seriously contended as late as 1817 that Congress had adopted the Hamiltonian Doctrine by appropriating money for the payment of the salary of the Senate chaplain, for the purchase of books for the library at Congress and paintings for the Capitol. (See *infra*, pp. 152-3.) As the Constitution did not expressly give the right to do these things, it was contended that Congress had no power to do them unless authorized by the welfare clause.

Another cause of confusion lay in the failure to discriminate between the right to dispose of public lands, or the proceeds thereof, and the purposes for which taxes could be raised.

In Section 3, of Article IV, of the Constitution, it is provided:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting territory or other property belonging to the United States;"

It is now settled that Congress has the right to dispose of public lands by gift or otherwise for such purposes as it sees fit, and while it holds them, of course, to take such

steps as are necessary for their use and protection. The donation or appropriation of land or the proceeds thereof was confused with the right to levy taxes and dispose of the proceeds, and it was contended that if appropriations or gifts of public land could be made for certain purposes, beyond the scope of the enumerated powers, it must follow that taxes could be levied for the same purposes.

The situation at the time must also be borne in mind. Virginia and other states had, from 1780 to 1785, before the adoption of the Constitution, ceded to the United States the vast region comprising the Northwest Territory, and later Georgia and North Carolina ceded the Southwest Territory extending to the Mississippi River. The Louisiana Purchase added another immense area to the United States. The United States not only controlled this territory, but actually owned most of the land.

It was essential that roads, canals, and other developments be carried out in this territory and also in the newly admitted States shortly organized within it, and also that provision should be made so that public land might be given or sold to settlers, private individuals, and to some extent to the States.

This was essential for military and police protection of the territory and the public lands, to enable the United States to sell and dispose of the lands, and enable the new States to obtain citizens and to provide a means of interstate commerce and communication between them and the eastern, seaboard States, and also to enable the United States to establish post roads and mail service as it was authorized by the Constitution to do.

Furthermore, in the eastern States, roads were essential for intercourse between the States, for carrying mails, and for military protection. We are apt to forget that there were most inadequate facilities of this char-

acter, even in the older States, and yet these facilities were essential for carrying out the express purposes which everyone admitted were conferred on the United States. In fact, as pointed out in the Congressional debates, it was often with difficulty that a Congressman could get to Washington from his own State, due to the inadequacy of the roads.

It was clear that unless the United States had power, as it was later determined it had, to control these matters, it might not be able to defend its territories adequately and practical means might be lacking for travel between the States. The new government might, in such case, fail from impotency, as did the Confederation. It was instinctively believed that the United States was intended to have power to provide for these matters in some way. Could it step in and construct the necessary roads, canals, etc. for Interstate Commerce and for military purposes and for the development of its own vast public lands? It was strenuously denied that it could do so, since it was contended this would deprive the States of their rightful jurisdiction. Others held that the United States could construct such roads or canals within the States, but only with the consent of the States. It was contended by others that the consent of the States could not confer authority on the United States.

Under these circumstances, advocacy of the Hamiltonian interpretation of the welfare clause was resorted to by those who felt the improvements must be made and that it was intended by the framers of the Constitution that it should have such power.

"We believe that the United States has been granted power to construct such roads and canals," they said, "but if it has no such power, will you not agree that Congress has the right to apply money to their construction? This doctrine is supported by Hamilton. It does

not involve taking any jurisdiction away from the States since they will control the roads and canals after their construction."

It was urged that the framers of the Constitution did not intend to leave the United States utterly impotent in respect to these improvements, as they were necessary for the carrying out of the powers expressly conferred upon it. It was argued that the right to apply money for their construction, since such construction was necessary to enable the United States to carry out the powers expressly granted, was clearly intended.

Another influence at work was the fact that the business chaos which had existed when the Constitution was adopted had disappeared, the tariff adopted for the protection of manufacturers as well as for revenue was producing a surplus in the Treasury which could be applied to these necessary "internal improvements" (the name by which roads, canals, etc., although intended for interstate communication or military purposes, were called as distinguished from improvements relating to foreign commerce), and Jefferson suggested the adoption of a constitutional amendment to permit of the surplus being applied to such purposes. The manufacturers feared that if this surplus could not be so applied, duties would be reduced, and they therefore joined in seeking a method of diverting it to such purposes.

In spite of these strong grounds for adoption of the Hamiltonian view, the remarkable thing which strikes the reader of the debates in Congress and the Acts passed by it, is the resistance on the ground of its unconstitutionality to undertaking such improvements, although now recognized as clearly within the powers of Congress, and the persistent refusal to accept the Hamiltonian doctrine. Gradually the States themselves provided these facilities, so that it became less necessary

for Congress to do so, and gradually it became agreed that Congress had power itself to construct interstate roads, canals, etc. It also became agreed that Congress could use public lands and their proceeds for purposes other than the enumerated powers. There was a persistent refusal to use tax money for matters over which it was admitted the States and not the United States, had jurisdiction, which, with minor exceptions, persisted until within the last thirty years.

Another cause of misunderstanding was the fact that the debates in the early Congresses were not printed until some time after Story wrote his *Commentaries,* nor were Madison's *Notes on the Debates of the Constitutional Convention* available until 1840. Had these records been available, it is more than likely that Storey and others would have expressed a different view as to the practice of the early Congresses.

(d) No early precedents adopted Hamilton's doctrine.

We shall now briefly discuss the early acts relied on by Story, and relied on by the Government in the present case, to show that Congress while still composed of members who participated in public affairs at the time of the Constitutional Convention and while still containing members of that Convention adopted the Hamiltonian view.*

THE CODFISHERIES ACT, 1792.

The first Act referred to by Story and by many after him as sustaining the Hamiltonian doctrine was the Codfisheries Act of 1792. This Act, on examination, is on the whole a precedent for the Madisonian view rather than the Hamiltonian view. An import duty on salt of six cents a bushel had been laid by the Tariff Act of

*Note. There were very few members of the Constitutional Convention in Congress after 1800. (See Charles A. Beard, *Economic Origins of Jeffersonian Democracy,* pp. 34-73.)

1789 (*Annals of Congress,* 1st Congress, Volume II, p. 2129). Section 4 of that Act had provided for a payment in lieu of drawback of the duties on salt where the salt, on which the duty had been paid, was used in curing fish which was subsequently exported. This payment amounted to five cents per quintal of dried fish. (*Idem.,* p. 2131.)

The Codfisheries Bill of 1792 in its original form provided that in lieu of this drawback payment, a "bounty" should be paid to the owners of fishing vessels, to be divided with the fishermen. On motion the word "bounty" was struck out and "allowance" substituted, (*Annals of Congress,* 2nd Congress, p. 401), and in this form the measure passed.

Those who proposed the bill stated that no bounty was intended, Gerry alleging (*Annals of Congress,* 2nd Congress, p. 376) that all that was asked was the payment of an amount equal to the duty which had been paid on the salt which was used in curing the fish.

Madison himself, on the ground that it did not provide a bounty but merely a repayment of duties, voted for the bill. As the question of the right of the United States to grant bounties was raised, however, he did deliver a long and carefully reasoned speech on the subject maintaining that the Constitution did not permit the payment of bounties, and stating fully his interpretation of the welfare clause and stating that if the Hamiltonian view were to be adopted,

> "I venture to declare it as my opinion, that were the power of Congress to be established in the latitude contended for, it would subvert the very foundation, and transmute the very nature of the limited Government established by the people of America; . . ." (*Idem.,* pp. 386-389.)

Williamson of North Carolina, a member of the Constitutional Convention, present when the welfare clause was adopted by the Convention, felt that the drawback might exceed the duty and thus amount to a bounty and therefore voted against the bill, and delivered a strong speech showing why the Hamiltonian interpretation was clearly not intended by the Constitutional Convention. We have quoted from this speech above (*supra,* pp. 89-91, *Annals of Congress,* 2nd Congress, p. 378).

It is clear that the bill was understood to be concerned with a matter relating to duties on imports over which the United States has control and, that it was not enacted by Congress, on the ground that it was justified by the Hamiltonian doctrine and that it affords no support to that doctrine.

THE SAN DOMINGO REFUGEES RELIEF ACT, 1794.

In the Third Congress (1794) the San Domingo Bill relied on by Story and the government and generally relied on to support the Hamiltonian theory was enacted. Some 2,000 French refugees from the Insurrection in San Domingo fled to this country and were destitute. An appropriation of $15,000 was proposed for their relief. It was vigorously opposed by Madison, by Giles, and by Nicholas as beyond the power of Congress. As a result it was amended on motion of the speaker so as to provide that "a regular account of the money so spent be kept; and that the President of the United States be requested to obtain a credit therefor in the accounts between the French Republic and the United States." In other words, a gift of the money for these purposes was not made, because of constitutional objections to the Hamiltonian theory; it was voted that it should be regarded as an advance or a loan to the French Government. It may be noted that it would

in any event be undoubtedly justified as in aid of foreign relations.

THE WHISKEY REBELLION SUFFERERS RELIEF ACT, 1795.

The Act of February 27, 1795 (1 Stat. 423) relied on by the Government merely provides damages for those who had suffered in the so-called "Whiskey Rebellion" by reason of assisting United States officers in enforcing the excise law. Obviously the United States has a right and moral duty to recompense citizens for assisting in the enforcement of its laws and probably for failure on its part to protect against damages from such resistance. Madison spoke in debate on the Bill; he did not favor it on practical grounds, but he did not suggest that it was objectionable because it supported the Hamiltonian doctrine. It was not enacted, nor was its passage urged or suggested on the basis of that doctrine.

WASHINGTON'S RECOMMENDATIONS RELATIVE TO AGRICULTURE AND A NATIONAL UNIVERSITY.

Washington in his First Message to Congress said that "the advancement of agriculture, commerce, and manufactures by all proper means, will not, I trust, need recommendation; . . ." The words "by all proper means" must be assumed to have been used advisedly. What means Washington deemed proper, we do not know except as interpreted by his speech of December 7th, 1796, referred to hereafter. It is not improbable in view of the assumption by the First Congress that import duties might be imposed with a protective object, that Washington had in mind protective duties for agriculture. As a matter of fact a protective duty was placed upon hemp by the First Congress.

The Government relies on Washington's speech to the Senate and House of Representatives on December 7,

1796 (*Annals of Congress,* 4th Congress, 2nd Session, pp. 1594-1595) which referred to agriculture as of primary importance to individual and national welfare. He said that institutions for promoting it grew up supported by the public purse—undoubtedly referring to the agricultural associations which had been incorporated under the laws of several States and which had been the objects of State bounty as well as private assistance. It is difficult to stretch Washington's words to imply a recognition of Federal bounties to agriculture, and Congress did not so interpret them.

Under date of January 11, 1797, the *Annals of Congress* show that Mr. Swift, for the committee to whom was referred that part of the President's speech relative to promotion of agriculture, made a report recommending the institution of a society for that purpose. This society was to receive no support from the Government except, it was suggested, that possibly the salary of a secretary and the expense of stationery might be provided. The following resolve was recommended,

> "Resolved, That a society for the promotion of agriculture ought to be established at the seat of Government of the United States."

Congress took no action for the creation of such a society.

In Madison's report on the Virginia resolutions (James Madison, *Report on Virginia Resolutions,* Elliot's *Debates,* 2nd ed., Vol. IV, p. 551), the latitude of power in the national councils assumed by the committee's report is deprecated, so that the failure of Congress to act upon the recommendation of the Committee presumably must be referred in part at least to opposition on constitutional grounds in Congress.

The President also referred in his address to the establishment of a national university in the District of Columbia. The plan was to give a certain amount of land for the erection of the building, but the university was to be supported entirely independently of Congress. (*Idem.*, pp. 1698-1702.) This did not involve the use of tax money. The House as a Committee of the whole voted against the project "by a great majority" (*Idem.*, p. 1704) and the proposal was eventually postponed (*Idem.*, p. 1711) and not revived in that Congress.

SAVANNAH FIRE SUFFERERS RELIEF BILL DEFEATED, 1797.

In the same Congress that declined to establish a society for the promotion of agriculture (1797), a bill was introduced to give relief to those who had "suffered by the late fire in Savannah, Georgia." The extent of the calamity was pictured as extreme. (*Idem.*, p. 1712.) Relief was denied by a vote of 55 to 24. (*Idem.*, p. 1727.) Strong constitutional objections were made.

Mr. Claiborne said,

> " . . . It was a sharp conflict between humanity to that suffering country and the Constitution." (p. 1720).

Mr. Nicholas said,

> " . . . The General Government had no power but what was given to it, but the State Governments had all power for the good of their several States. If the general welfare was to be extended (as it had been insinuated it ought) to objects of charity, it was undefined indeed." (p. 1723).

VIRGINIA RESOLUTIONS (1798), AND MADISON'S REPORT (1800) THEREON CONTROVERTED HAMILTON'S DOCTRINE.

In 1798 the famous Virginia Resolution by the Virginia Assembly and in 1800 Madison's report upon those reso-

lutions directly controverted the Hamiltonian Doctrine. Elliot's *Debates,* 2d. Ed., Vol. I, pp. 528, 550-553.)

TWO ACTS (1803, 1804) TO RELIEVE FIRE SUFFERERS RELATED TO BONDS FOR DUTIES.

Two Acts were passed, one in 1803 (6 Stat. 49) and one in 1804 (6 Stat. 53), both relied upon by the Government, for the relief of sufferers from fires. An examination of these Acts shows that they merely provided that such sufferers who had given bonds for duties might take up those bonds and give new bonds with sureties payable at a later date. This was clearly an exercise by Congress of control over collections of taxes and not a recognition of the Hamiltonian doctrine.

ACT FOR RELIEF OF EARTHQUAKE SUFFERERS IN MISSOURI TERRITORY.

The Act for the relief of sufferers by earthquake in New Madrid, Missouri (3 Stat. 211) relied on by the Government was in aid of persons in a territory, and authorized merely a grant of public lands and not tax moneys.

VENEZUELA EARTHQUAKE SUFFERERS RELIEF ACT, 1812.

The Act of 1812 (2 Stat. 730) to aid sufferers from earthquake in Caracas, Venezuela, relied on by both Story and the Government was passed almost without debate and without a discussion of the Constitutional question involved. At the time the foreign relations of the country were in a very strained condition, and we were about to engage in war with England. Venezuela, on July 14, 1811, had declared its independence from Spain and was attempting to defend its independence by force as we had done just previously, and its status was a matter of great concern to the United

States. It would seem that the grant was justified on the ground of promoting foreign relations. In any event, it was a minor appropriation made without comment or debate. Had it been recognized as establishing the Hamiltonian principle, it is clear, that it would have excited debate, and entirely clear, that Madison, then President, would have vetoed it. Stevenson, of Virginia, at a later date (January 19, 1827) said with respect to the Venezuela Act and also the Act in aid of the San Domingo refugees (*Congressional Debates,* Vol. III, pp. 757-8):

> "Might not those cases have been defended under the power of the General Government for great external objects? The war and treaty making power, and foreign relations, belongs exclusively to this Government, and, in their exercise, can never conflict with any of the reserved powers of the States. . . . May not those who passed these acts have considered the right to do so as belonging to these great classes of powers? May they not have believed that the observation of benevolence and goodwill towards nations was the policy and duty dictated by the laws of nations, and that, in the exercise of the treaty making power, it was in the power of this Government to conciliate, by acts of kindness and benevolence, those nations with whom they might be disposed to treat?"

CONCLUSION AS TO SO-CALLED RELIEF LEGISLATION.

In short, an examination of the records clearly justifies the conclusion of Mr. Warren:

> "These three statutes—the Codfisheries Act in 1792, the San Domingo Act in 1794, and the Venezuela Act in 1812—the first, based on the Commerce Clause; the second, on the Debt Paying Clause; and the third, merely on a desire to foster our foreign relations—constitute the sole instances of Congres-

sional donation of Government tax revenues, between the year 1789 and the year 1867—a period of seventy-eight years." (Charles Warren. *Congress as Santa Claus,* pp. 20, 21.)

That they were not recognized as based on an acceptance of the Hamiltonian doctrine is shown by the debate in 1827 on the bill for the appropriation for sufferers by fire at Alexandria in the District of Columbia. This Bill was enacted but the opinion was expressed that its constitutionality "rested solely on the fact that the city to be relieved was within the District over which Congress had exclusive jurisdiction. Without the limits of that district, he would not view such a relief as constitutional:" (See speech, Burges, *Congressional Debates,* Vol. III, p. 752).

Opposition was made on the ground that it involved a mere donation of money.

Mr. Rives said,

> "According to the broadest construction which had ever been put on this clause (the welfare clause), it justified no appropriation of the public money but for some purpose connected with the common defence and general welfare of the Union. For his part, said Mr. R., he had always thought that these general terms were limited and defined by the subsequent enumeration of specific powers granted to Congress, and that we could not legitimately vote away the public money but in execution of some of the powers so granted." (*Congressional Debates,* Vol. III, p. 758.)

ROADS AND CANALS.

We have shown the situation confronting the country with respect to the necessity for roads and canals to

develop the vast western territory, to provide military protection, and to provide for intercourse between the States newly created in the West with the Eastern seaboard States.

In 1802, in the Act authorizing the admission of Ohio as a State, it was provided that one twentieth part of the net proceeds of the lands in Ohio sold by Congress should be applied to laying out and making public roads leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State and through the same, such roads to be laid out under the authority of Congress with the consent of the several States through which the road should pass. (2 Sts. 173, 175). This was on condition that the State exempt from taxation for five years, all public lands in the State sold by Congress. (*Ibid.*) On March 29, 1806, an act was passed providing for the survey and construction of the Cumberland road from Cumberland, Maryland to Ohio. Thirty thousand dollars was appropriated, to be paid out of the fund created from the sale of public lands in Ohio. Thereafter other sums were appropriated, payable out of the fund either immediately or ultimately. (1811, $50,000, 2 Sts. 661; 1812, $30,000, 2 Sts. 730; 1815, $100,000, 3 Sts. 206; 1825, $150,000, 4 Sts. 128.) It was not until 1827 (4 Sts. 228) that money was appropriated for the Cumberland road without providing either that it should be paid, or repaid, out of the five per cent fund. Provision was made for surveying or laying out certain other roads, largely interstate or situated in the territories or on the public domain. Small appropriations in some cases were made out of the general funds for expenses.

JEFFERSON'S MESSAGE TO CONGRESS, 1800.

Jefferson in his annual message of December 2, 1806 referring to the growing surplus in the treasury, re-

marked that it would be inadvisable to reduce duties since they were laid largely on luxuries and expressed the wisdom of applying the surplus to "public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of Federal powers". (James D. Richardson, *Messages and Papers of the Presidents*, Vol. I, p. 409.) He recommended an amendment to the Constitution to permit such application "because the objects now recommended are not among those enumerated in the Constitution", (*Idem.*, p. 410).

MADISON'S MESSAGE TO CONGRESS, 1815.

In his message to Congress of December 5, 1815, Madison spoke of the great importance of "establishing throughout our country the roads and canals", which he referred to as "facilities for intercommunication in bringing and binding more closely together the various parts of our extended confederacy." He added that "any defect of constitutional authority which may be encountered can be supplied in a mode which the Constitution has providently pointed out." (*Idem.*, pp. 567-568).

MADISON'S VETO MESSAGE, 1817.

On March 3, 1817, Madison vetoed a bill which set apart the bonus and dividend payments from the National Bank (not tax moneys) "for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense," (*Idem.*, p. 584). He held that the power to regulate commerce did not include the "power to construct roads and canals, and to im-

prove the navigation of water courses." (*Idem.*, p. 584.) He held further that the welfare clause does not grant power to appropriate for such purposes.*

MONROE'S MESSAGE TO CONGRESS, 1817.

President Monroe, in his first message to Congress, December 2, 1817, (*Idem.* II, pp. 11, 18), referring to the vast territory of the United States, said,

> ". . . we can not fail to entertain a high sense of the advantage to be derived from the facility which may be offered in the intercourse between them by means of good roads and canals. . . . A difference of opinion has existed from the first formation of our Constitution to the present time among our most enlightened and virtuous citizens respecting the right of Congress to establish such a system of improvement. . . . Disregarding early impressions, I have bestowed on the subject all the deliberation which its great importance and a just sense of my duty re-

*NOTE. President Jackson subsequently misinterpreted Madison's veto message. (Elliot's *Debates*, Second Edition, Volume IV, pages 526, 527.) It ought to have been apparent that Madison did not believe Congress had power to appropriate money for internal improvements, because the Bill which was vetoed was one which simply appropriated money. (*Annals of Congress*, 14th Congress, Second session, pages 1061-1062.) Madison's letter to Tucker and his letter to President Monroe, both written during the same year (*Letters and Other Writings of James Madison*; published by order of Congress, Volume III, pages 54, 56) make Madison's position perfectly clear, if it was ever really in doubt. That the meaning attributed to the Message by Jackson was not the one placed upon it by Congress, is shown by the fact that in the December following the veto, Barbour of Virginia, introduced a proposal for a Constitutional Amendment to the effect that "Congress shall have power to pass laws *appropriating money* for constructing roads and canals, improving the navigation of water courses." (Italics supplied.) (*Annals of Congress*, 15th Congress, First session, Volume I, pages 21, 22.) When Jackson's Message was sent to Madison by Van Buren, Madison wrote Van Buren as follows:

> ". . . In returning his thanks for this polite attention, he regrets the necessity of observing that the Message has not rightly conceived the intention of J. M. in his veto in 1817, on the bill relating to internal improvements. It was an object of the veto to deny to

quired, and the result is a settled conviction in my mind that Congress do not possess the right. It is not contained in any of the specified powers granted to Congress, nor can I consider it incidental to or a necessary means, viewed on the most liberal scale, for carrying into effect any of the powers which are specifically granted. In communicating this result I can not resist the obligation which I feel to suggest to Congress the propriety of recommending to the States the adoption of an amendment to the Constitution which shall give to Congress the right in question."

COMMITTEE'S REPORT AND DEBATES ON MONROE'S MESSAGE, 1817.

This part of the President's message was referred to a committee, of which Mr. Henry St. George Tucker of Virginia was chairman, which made a lengthy report which was the subject of several days' debate in the House. (*Annals of Congress,* 15th Congress, 1st Sess., Vol. I, pp. 1114-1250, and see, 1283-1312; Vol. II, 1313-1400.) Every possible view was expressed as to the

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Congress as well the appropriating power as the executing and jurisdictional branches of it. And it is believed that this was the general understanding at the time, and has continued to be so, according to the references occasionally made to the document. Whether the language employed duly conveyed the meaning of which J. M. retains the consciousness, is a question on which he does not presume to judge for others." (*Letters and Other Writings of James Madison;* published by order of Congress, Volume IV, page 88.)

What Madison undoubtedly meant was that the Federal Government could accomplish almost as much by the appropriation of money as it could by the exercise of legislative power, and consequently to concede Congress the appropriating power with the breadth claimed, would be to frustrate the intention of the framers, to create a government of limited powers. Other statements of Madison show that that is what he thought, *eg.* The speech on the Codfisheries Bill. (*Annals of Congress,* Second Congress, pages 386, 388, 389), Letter to Stevenson, and supplement to that letter (*Letters and Other Writings of James Madison;* published by order of Congress, Volume IV, pages 126, 128, 134, 135, 137, 138).

powers granted Congress in this respect. A reading of the debates gives a clear idea of the confusion of mind and the different points of view existing at this time on the powers of Congress in respect to interstate commerce, military defense and navigation.

The committee's report defends the right of the United States to construct roads and canals necessary for interstate communication and military purposes, at least with the assent of the States in which they are situated. Congress, the report says, is expressly authorized "to make all laws necessary and proper for carrying into effect" its powers. The report contends that the right to construct such roads and canals is "necessary" to carry out the powers expressly granted. The only question is whether such construction by the United States is "proper" in view of the fact that it would be "an interference with the jurisdiction of the States over its own soil" which might not be "proper" without the assent of the States. In the opinion of the committee, with the assent of the States involved the objection as to its being proper would be removed.

The report then adds that if this construction is not possible, Congress, in its opinion, can apply funds for these purposes under the welfare clause, and that previous action of Congress justifies such application. (*Annals of Congress,* 15th Congress, 1st Sess., Vol. I, p. 458.)

> "A few of the very great variety of instances, in which the revenues of the United States have been applied to objects not falling within the specified powers of Congress, or those which may be regarded as incidental to them, will best illustrate this remark.
>
> "Thus, it can scarcely be conceived, that, if construed with rigor, the Constitution has conferred the power to purchase a Library, either specifically or as

> a 'necessary' incident to legislation. Still less, perhaps, can the pious services of a Chaplain, or the purchase of expensive paintings for ornamenting the Hall of session, or various other expenditures of similar character be considered as 'necessary' incidents to the power of making laws. Yet, to these and to similar objects have the funds of the United States been freely applied, at every successive session of Congress, without a question as to the constitutionality of the application."

In the debates it was vigorously asserted that Congress had the power without the assent of the States to construct such facilities as roads and canals in order to carry out its powers to regulate commerce, to transport the mails, and provide the necessary facilities for military defense. The evils resulting from lack of communication were pointed out. The United States would be unable to transport its troops or defend its territory without such roads, and the expense which would be incurred in a few campaigns for lack of these facilities would reimburse the entire cost. (*Idem.*, pp. 1126-1128.)

It was vigorously contended that if Congress did not have the power to construct the roads it had no power to appropriate money for such construction.

Mr. Smyth of Virginia said (*Idem.*, p. 1146),

> " . . . It is properly admitted by the select committee, that the clause grants no power but to raise money. The common defence and general welfare are to be provided for, by expending the money raised in the execution of the other powers expressly granted."
>
> "If Congress have greater latitude in making appropriations than in passing other laws, it is not given to them by the Constitution."

In a long carefully reasoned speech, he said (*Idem.*, pp. 1161-1162),

" . . . His idea as to the correct construction of that instrument, was this:—That the common defence and general welfare, were the ends proposed to be attained—the enumerated powers which followed, were the means of attaining them; and that money was the instrument, as far as it was necessary, by which those powers were to be executed. In support of this construction, he would refer the Committee to the forty-first number of the Federalist, in which the question is strongly asked, for what purpose could the enumeration of particular powers be inserted, if these, and all others, were meant to be included in the preceding general powers? There could be but one answer to this question—that the specification was intended to operate as a limitation of the general words which preceded it. If, then, the proposition were correct, that we must look to the enumeration of particulars, for the extent of our powers, we must look to the same source, for the extent of our right of appropriation. For why, sir, was the right of raising money, by taxes, given us? He would answer, that money was, to the body politic, what blood was to the natural body. It gave to it its life and vigor, and enabled it to perform its functions. The power of raising it, then, was given to us, as he had already remarked, as the instrument by which we were enabled to execute our other powers. What were they? Those which were enumerated, and the necessary incidents which they involved. . . . Unless, then, the application of money shall be construed to extend to the objects of the specified powers, and the necessary incidents only, the Constitution will be chargeable with the palpable inconsistency of intending to impose limitations upon us, and at the same time furnishing us, by means of

the tax-laying power, with an instrument, by which we may, at pleasure, thrown off those very limitations."

It was finally resolved by very close votes (*Idem.*, p. 1249), (1) that Congress has power to appropriate money for the construction of post roads, military and other roads, and of canals and for the improvement of water courses; (2) that Congress has power to construct post roads and military roads; (3) that Congress has power to construct roads and canals necessary for commerce between the States; (4) that Congress has power to construct canals for military purposes. The resolution "that it is expedient that the sum to be paid to the United States under the 20th section of the Act to incorporate the subscribers to the Bank of the United States, and the dividends which shall arise from their shares in its capital stock, shall be constituted as a fund for the construction of roads and canals," was decided in the negative, ayes 72, noes 73.

MONROE'S VETO OF CUMBERLAND ROAD BILL, 1822.

President Monroe on May 4, 1822 vetoed a bill for the Cumberland Road because it provided that the United States should have the power to establish and collect tolls and generally have jurisdiction over the road. He held that the powers granted the United States did not include the power to have jurisdiction over property situated in the States even though constructed for interstate purposes, post roads, military roads, or otherwise. He transmitted with his veto a statement of his views in which he advocated the Hamiltonian view, namely, that money could be appropriated for these purposes so that the United States would be able to see that these facilities were provided, but that Congress could exercise no jurisdiction over their construction or over the roads after

they were constructed. (James D. Richardson, *Messages and Papers of the Presidents,* Vol. II, p. 142.)

We have not space to continue a detailed examination of action by Congress or the attitude of the Executive. It may be interesting, however, to refer briefly to a few later presidential messages and vetoes.

PRESIDENT JACKSON'S VIEWS.

President Jackson held that Congress could not control or take jurisdiction over such improvements "if jurisdiction of the territory, which they may occupy be claimed as necessary to their preservation and use; . . . Although frequently and strenuously attempted, the power to this extent has never been exercised by the Government in a single instance. It does not, in my opinion, possess it, and no bill therefore which admits it can receive my official sanction." (James D. Richardson, *Messages and Papers of the Presidents,* Vol. II, pp. 484-485.)

While Jackson apparently believed that the Madisonian doctrine was correct, he felt that precedents for appropriations for these purposes had established the practice and right, but he was opposed to such appropriations in general as a matter of policy.

PRESIDENT POLK'S VETO MESSAGE, 1847.

President Polk in his veto message of December 15, 1847 (*Messages and Papers of Presidents,* Vol. IV, pp. 610, 618-620) referring to the Hamiltonian doctrine, said,

> "The power of appropriating money from the Treasury for such improvements was not claimed or exercised for more than thirty years after the organization of the Government in 1789, when a more latitudinous construction was indicated, though it was not broadly asserted and exercised until 1825."

Refuting President Monroe's advocacy of the Hamiltonian doctrine, he said,

> "But it is impossible to conceive on what principle the power of appropriating public money when in the Treasury can be construed to extend to objects for which the Constitution does not authorize Congress to levy taxes or imposts to raise money."

PRESIDENT PIERCE'S VETO MESSAGE, 1854.

President Pierce in a veto message of May 3, 1854, of a bill providing for a grant of public lands to the several States for the benefit of indigent insane persons, definitely adopts the Madisonian view although the expenditure of tax money was not involved. (James D. Richardson, *Messages and Papers of the Presidents,* Vol. V, pp. 247, 250-252.)

PRESIDENT BUCHANAN'S VETO MESSAGE, 1860.

President Buchanan also supported the Madisonian view in his veto message of February 1, 1860, (James D. Richardson, *Messages and Papers of the Presidents,* Vol. V, pp. 599, 601) in which he supported the opinion expressed by President Polk in his veto message above referred to of December 15, 1847.

CONCLUSION AS TO PRECEDENTS PRIOR TO CIVIL WAR.

It is clear from the above that not only was there no general agreement in the early Congresses with the Hamiltonian interpretation, but that on the contrary there was violent opposition to the Hamiltonian view. The Savannah relief bill of 1797 was opposed because of opposition to this doctrine, and was defeated apparently on constitutional grounds, and there is not a clear-cut case in any of the early Congresses in which it was adopted. Even when it was sought to be adopted it was usually attempted to be applied to the appropria-

tion of money for matters relating to interstate roads or canals, or roads necessary for military defense, or to develop the public lands; in other words, to matters jurisdiction of which it is now admitted was confided to Congress. The thought really was that these improvements were essential as a means of enabling the powers granted to the United States to be carried out. The objection to having the United States construct the improvements itself was, that it might interfere with the jurisdiction of the States, but it was felt that if money only were appropriated and no control taken, no interference with the jurisdiction of the States could result, so that this objection was removed.

We submit that the advocacy of the Hamiltonian doctrine by those who succeeded Hamilton was another form of stating that the United States had an implied power to appropriate money towards such purposes as interstate communication, military defense, postroads, etc.

We confidently assert that if the broad nature of the powers, which it was later held had been actually conferred by the Constitution upon Congress, had been thoroughly understood, the Hamiltonian doctrine, which was seized upon and advocated principally as a means of aiding in carrying out these powers, would have rapidly been forgotten.

PRECEDENTS AFTER CIVIL WAR.

We have no space to deal with later precedents. A more extended statement is made by Charles Warren, in *Congress as Santa Claus*. They may be divided into the following classifications.

(1) After 1867 donations for the relief of sufferers from disaster, both local and foreign, have occasionally been voted by Congress.

(2) In 1862 a Statute was enacted granting public lands to the States for the establishment of Agricultural Colleges, on conditions laid down by the Government; (Act of July 2nd, 1862, 12 Stat. 503). This Bill had previously been vetoed by President Buchanan; (February 24th, 1859).

Grants of land before this had usually been made for a consideration or they provided some compensation in return, such as an exemption of taxation of other public lands for a period of time, or in the form of some benefit to the remaining Government lands.

This legislation only appropriated land which the Government had power to dispose of or give away as it pleased, and constitutes no precedent for the use of moneys raised by taxation.

Beginning in 1887 distributions were made to the States for agricultural experiment stations, but until 1907 these purported to be appropriated from public land funds and not taxes. (See Charles Warren, *Congress as Santa Claus,* pp. 92-93.)

(3) In the last thirty years there have been several grants made to the States from general funds for special purposes to be administered by the States in accordance with plans laid down by Congress. It was usually provided that the State should contribute to the plan itself. Such is the Shepard-Towner Maternity Bill. These grants are for purposes not concerned with the enumerated powers.

(4) The Agricultural Department was established in 1862; other departments or bureaus have followed. Many of these departments or bureaus are in large part or wholly concerned with matters over which Congress has jurisdiction, such as the Interstate Commerce Commission, Federal Trade Commission, etc. A number like

the Agricultural Department, Labor Department, Public Health Service, etc., are principally concerned, as the Government Brief shows, with collecting statistics, research and diffusing information and advice. The Government has power to collect statistics and to make investigations. Such information may be regarded as necessary in order that proper legislation may be passed, as a thorough knowledge of all business and economic conditions is necessary to wise legislation. It would seem for similar reasons that appropriations for research, are permissible within the Madisonian theory of the welfare clause. When such information has been obtained, the Madisonian theory would not forbid Congress to make it public and useful.

While it is not material in this case, it would seem, therefore, that the Madisonian interpretation does not prohibit the maintenance of these departments and expenditures for most if not all of the purposes for which they were created.

(5) Finally, in the last few years a number of Acts like the present have been passed, definitely appropriating money for purposes outside the powers granted Congress, and sometimes, as in the present case, for the purpose of exercising control of a matter confided by the Constitution to the jurisdiction of the States.

An examination of the legislation from the adoption of the Constitution shows not only a refusal to recognize the Hamiltonian doctrine until after the Civil War, but also that, except for sporadic gifts for relief and a few instances of gifts to the States to carry out certain policies which are not of extreme importance, there has been since that time up to recently comparatively little legislation and that principally within the last thirty years, which has violated the Madisonian doctrine that taxes

can be levied only to pay the debts of the United States, and to provide for the common defense and for such matters of general welfare, as are embraced within the powers conferred upon the United States.

XIII.

THE HAMILTONIAN INTERPRETATION OF THE GENERAL WELFARE CLAUSE DOES NOT AUTHORIZE THE PRESENT LEGISLATION.

Under the Hamiltonian interpretation of the welfare clause Congress has power to tax and apply the proceeds for the purposes comprised within the powers granted Congress and also for other purposes.

But this interpretation does not give Congress the right to tax and apply the proceeds for any purpose it pleases. It has still only a restricted right to tax for the "general welfare of the United States." To hold that "the general welfare of the United States" is broader than the powers granted the United States does not make it all-inclusive. Its scope and limitations must still be defined.

The Constitution expressly denies to the United States any power to control agriculture and confides this authority to the States. We submit that if the United States has the right to apply tax moneys to agriculture, it clearly has not the right to do so for the express purpose and in such manner as to result in the regulation of agriculture, which right was expressly denied it by the Constitution. Otherwise, this vague phrase authorizing the United States to tax to provide for the general welfare would give Congress power to defeat the express intent and provisions of the Constitution.

1. UNDER THE HAMILTONIAN INTERPRETATION OF THE GENERAL WELFARE CLAUSE A RIGHT TO TAX FOR LIMITED PURPOSES ONLY IS GRANTED.

Even were no limitations provided in the Constitution as to the objects for which taxes could be levied, the right to tax would still be subject to certain limitations.

Taxes could only be levied for public purposes. The right to tax like all other powers granted the Federal Government could not be exercised in violation of the due process clause of the Fifth Amendment.

But in this case the right to tax is expressly limited, even under the Hamiltonian view, to levying taxes to be applied for the general welfare of the United States. This phrase, even under the Hamiltonian view, as we shall show below, has distinct limitations.

Mr. Justice Story, one of the strongest advocates of the Hamiltonian theory, says in his *Commentaries on the Constitution* (5th Edition, p. 663), that the true meaning

> ". . . will be best illustrated by supplying the words which are necessarily to be understood in this interpretation. They will then stand thus: 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, *in order* to pay the debts, and to provide for the common defence and general welfare of the United States;' that is, for the purpose of paying the public debt, and providing for the common defence and general welfare of the United States. In this sense, Congress has not an unlimited power of taxation; but it is limited to specific objects,—the payment of the public debts, and providing for the common defence and general welfare. A tax, therefore, laid by Congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority."

Again he says (pp. 672-3):

> "A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified purposes is a limited power. A power to lay taxes for the common defence and general welfare of the United States is not in common

> sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defence proposed by a tax be not the common defence of the United States, if the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the Constitution. If the tax be not proposed for the common defence, or general welfare, but for other objects, wholly extraneous . . . . it would be wholly indefensible upon constitutional principles. The power, then, is, under such circumstances, necessarily a qualified power."

Hamilton himself in his famous Report on Manufactures recognized that the purpose must be

> ". . . general and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot." (Hamilton's *Works,* Lodge ed., Vol. III, p. 372.)

Monroe, an adherent of the Hamiltonian view, in his veto of the Cumberland Road Bill on May 4, 1822, (Richardson's *Messages and Papers of the Presidents,* Vol. II, pp. 142, 167) said:

> "If, then, the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants according to a strict construction of their forms, respectively, is there then no limitation to it? Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not."

He continues to say that the purposes must be of general, not local interest, and not a State "benefit."

2. NATURE OF THE POWER TO TAX AND TO APPROPRIATE FOR THE GENERAL WELFARE OF THE UNITED STATES.

Under the Hamiltonian view the taxing power provides for two things: first, the power to tax for certain purposes; second, the right to appropriate or apply the money so raised for those objects for which they may be levied. The former is a legislative power, strictly speaking; the latter not, since it gives no control over any subject matter but merely a right to apply money to the subject matter.

That the right to appropriate is not a power in the legislative sense is the essential doctrine of the Hamiltonians. Otherwise, as they admit, their view could not be sustained. If the right to appropriate money for an object gave the right to regulate or control that object or the subject matter thereof, then if Congress can, as they contend, appropriate money for substantially any purpose beyond the scope of the granted powers, such as agriculture, manufacturing, etc., all that Congress would need to do to enlarge the granted powers would be to appropriate money for some other object and then proceed to legislate in respect to the subject matter thereof and so control it. But this would make the United States a government of practically unlimited powers which the Hamiltonians admit it is not. Therefore it is essential to their doctrine that the power to appropriate be strictly limited to an application of money, and that it give no right whatsoever to legislate with respect to or regulate the subject matter for which the money is appropriated.

Thus Hamilton in his *Report on Manufactures* said, (Hamilton's *Works,* Lodge ed., Vol. III, p. 372)

> "And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce,

> are within the sphere of the national councils, *as far as regards an application of money.*" . . . "*A power to appropriate money* with this latitude, which is granted, too, in express terms, would not carry a power *to do any other thing not authorized in the Constitution,* either expressly or by a fair implication." (Italics ours.)

Jefferson in his opinion on the Bank of the United States (February 15, 1791, 4 Jefferson's *Works,* 524, 525) said:

> " 'To lay taxes to provide for the general welfare of the United States'; that is to say, 'to lay taxes *for the purpose* of providing for the general welfare'. For the laying of taxes is the *power,* and the general welfare the *purpose* for which the power is to be exercised. Congress are not to lay taxes *ad libitum, for any purpose they please;* but only *to pay the debts, or provide for the general welfare of the Union.* In like manner they are not *to do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose."

Mr. Justice Story strongly supports this view (see *Commentaries on the Constitution,* Vol. I, pp. 717-727).

3. THE POWER TO TAX AND TO APPROPRIATE MONEY FOR THE GENERAL WELFARE GIVES NO AUTHORITY TO LEGISLATE WITH RESPECT TO OR TO CONTROL AGRICULTURE.

The general welfare clause, then, under the Hamiltonian view contains two powers: first, the power to tax for certain purposes; second, the right to appropriate the money so raised for these purposes.

The first power—the power to tax—gives Congress no power to authorize any such regulation of agriculture as is provided for in the present legislation. Such a control of agriculture has no relation whatsoever to the

power to tax. Under that power Congress can designate the object to be taxed, the amount of the tax, and make provision to insure the collection of the tax, and that there be no evasion.

Linder v. *United States,* 268 U. S. 5.
Nigro v. *United States,* 276 U. S. 332.

In *Linder* v. *United States,* which concerned an act providing for taxation of sales of narcotics, the Court said (p. 18):

> "Obviously, direct control of medical practice in the States is beyond the power of the Federal Government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure."

A restriction of the production of cotton has no relation to the enforcement of a tax on the processing of cotton. The restriction on growing cotton does not in any conceivable way assist in the collection of the tax.

Any right of the United States, then, to restrict the growing of cotton must be derived from the right to "appropriate" the money raised by the tax for the benefit of agriculture.

But the right to appropriate money for the benefit of agriculture gives no right to regulate agriculture. Control over agriculture is not a necessary or a direct result of the right to appropriate money or an indirect result of the exercise of such right.

Assuming that Congress has the right to appropriate money for the benefit of agriculture, we are confronted with the scope of that right. As we have shown above, the Hamiltonians themselves are the first to admit that the right to appropriate confers no power to control or legislate with respect to the subject matter, since if it

did their entire theory would collapse as it would involve giving the United States unlimited powers.

It is clear, then, that if Congress has the right to appropriate money for purposes beyond the scope of its granted powers, this right gives it no right or power directly to regulate by prohibitions or legislate with respect to such matters. We therefore submit that it gives the United States no right to use the power to appropriate for the direct purpose of putting into effect a scheme or plan for the regulation of agriculture or any other local matter the regulation of which was clearly intended by the Constitution to be subject to the exclusive jurisdiction of the States. Otherwise the clause would enable Congress through the right of appropriation to control matters which the Constitution and the Tenth Amendment forbid it to control.

Thus, Monroe, who adopted the Hamiltonian view, said, of the restricted nature of this right of appropriation:

> "But the use or application of the money after it is raised is a power altogether of a different character. It imposes no burden on the people, nor can it act on them in a sense to take power from the States, or in any sense in which power can be controverted, or become a question between the two governments."

The right to appropriate money for an object gives Congress the right to designate the object and to authorize a disbursing officer to pay over such money to the designated recipient. It does not give Congress power to use the appropriation for the purpose of controlling the subject matter to which the money is to be applied.

The use of the appropriation to bring about such control is not necessary to the exercise of the right to appropriate nor a direct or indirect consequence of the exercise of such right.

In the present case the scheme of control or restraint is not an incidental result of the appropriation. On the contrary, the appropriation is incidental to the scheme of restraint. **The restraint is not imposed to enable Congress to make the appropriation. On the contrary, the appropriation is made to enable Congress to carry out the scheme of restraint.**

The Hamiltonians admit that Congress is not authorized by the Constitution to control matters outside the enumerated powers; they only contend that Congress can appropriate money for such other purposes. If, however, Congress can use this power to appropriate in respect to these other matters for the direct purpose of controlling them, then it is clear that the intent of the framers of the Constitution to limit the powers granted to the United States will be defeated by the exercise of the right to appropriate. There are few schemes or regulations in respect to such other matters which Congress, backed by the unlimited power of taxation, could not accomplish by these means. The basic principle of the Constitution would be destroyed. It is clear that the right to appropriate money can give no power so inconsistent with the Constitution.

4. THE PURPOSE OF THE LEGISLATION MUST BE JUDICIALLY INQUIRED INTO.

The Government contends that if we are correct in our contention that Congress is not authorized to tax for the purpose of controlling agriculture, the court can not take cognizance of this purpose, since the motives of Congress can not be inquired into. Therefore the fact that

these taxes are levied for the purpose of regulating agriculture is not a matter which can be inquired into judicially. It seeks to differentiate the *Child Labor Tax case*, 259 U. S. 20, and *Hill* v. *Wallace*, 259 U. S. 44, on the ground that in these cases it appeared on the face of the legislation that the purported tax was not intended as a tax but as a penalty, a prohibition of certain conduct, and that therefore there was no legislation intended to raise revenue and no proper exercise of the power to tax, while in this case we have a real revenue measure intended to raise money, and therefore the purposes for which it is raised can not be inquired into. It quotes in support of this contention *McCray* v. *United States*, 195 U. S. 27, and *United States* v. *Doremus*, 249 U. S. 86, and similar cases.

The fallacy of the argument is that it leaves out of consideration the fact that the power to tax is a restricted power. Congress can only levy taxes for specific purposes, as we have shown above. The express purpose for which the present taxes are levied is set forth in the act. The question is therefore necessarily raised as to whether this purpose is one for which Congress is permitted under its restricted taxing power to levy taxes.

In the McCray case and the other cases relied on by the Government, the apparent and purported purpose of the tax—to enable the United States to obtain revenue for general treasury purposes—was a proper one. The act on its face was a valid exercise of the power of taxation. The question therefore was whether the court could look beyond the face of the legislation and the fact that it purported to exercise a valid power in order to determine whether the real motive in the minds of the legislators was to raise revenue, as appeared on the face of the act, or was to accomplish some other ulterior purpose. The court held that Congress had authority to

impose a tax on oleomargarine; that the effect on sales of oleomargarine was an indirect result of an exercise of power conferred on Congress and whether the accomplishment of the indirect effect was the motive in the minds of the legislators could not be inquired into.

In the *Child Labor Tax* case and *Hill* v. *Wallace* the court held that although the legislation purported to levy a tax for general revenue purposes, the unlawful and ulterior purpose appeared on the face of the act and did not have to be sought in the minds of the legislators and that therefore it could be taken into consideration.

In the present case not only does the purpose appear on the face of the act, but, furthermore, since a tax can be levied only for certain limited purposes and since the purpose here is stated, it necessarily must be inquired into in order to determine if the tax is within the purposes for which Congress is expressly authorized to tax.

5. LIMITATIONS ON THE PURPOSES COMPRISED WITHIN THE PHRASE "GENERAL WELFARE OF THE UNITED STATES".

We have shown above that the words "general welfare of the United States" restrict the power to tax to purposes comprised within this phrase.

What are the limitations? It is not necessary for the purposes of this case to determine them exactly. It was said with reference to the limitations on the power to control interstate commerce in *Schechter* v. *United States* (*supra* p. 546), "the precise line can be drawn only as individual cases arise, but the distinction is clear in principle." It is not necessary here to draw a line applicable to every individual case. What is needed is to lay down general principles. Their application to the present case will clearly appear.

The following limitations we submit must be recognized:

(a) Hamilton himself and all the Hamiltonians admit that the purposes must be general, not local (see *supra* p. 164).

(b) The "general welfare of the United States" can not be the general welfare solely of some other country or solely of people other than citizens of the United States. Their welfare would not be the welfare of the United States. Thus, Mr. Justice Story says in his *Commentaries* (Vol. I, pp. 672-3):

> "If the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous (as, for instance, for propagating Mahometanism among the Turks, or giving aids and subsidies to a foreign nation, to build palaces for its kings, or erect monuments to its heroes), it would be wholly indefensible upon constitutional principles."

(c) The tax must be for a public as distinguished from a private purpose; otherwise, it would violate the due process clause of the Fifth Amendment.

(d) It can not be for an illegal purpose which includes a purpose which is in violation of or repugnant to the Constitution.

This latter limitation clearly invalidates the present legislation.

However broadly we may interpret the phrase "general welfare of the United States," we cannot interpret it as permitting the levying of taxes for an illegal purpose or one which violates the Constitution. Such purposes can not be held to be for the welfare of the United States.

However absolute the right to appropriate, it is subject to this necessary qualification. As Mr. Justice Holmes said in *Fidelity and Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434:

> "But it has been held a great many times that the most absolute seeming rights are qualified and in some instances become wrongs. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

To put an extreme example, it is clear that a tax could not be legally levied for the purpose of paying the proceeds to such persons as murdered their next door neighbors.

In *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535, where the question of whether the right of a State to exclude a foreign corporation could be exercised merely because the corporation had resorted to the federal court, Mr. Justice Bradley (in a dissenting opinion now the law) said:

> "The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property."

6. AN APPROPRIATION MADE FOR THE DIRECT PURPOSE OF RESTRICTING OR INTERFERING WITH OR REGULATING AGRICULTURE IS REPUGNANT TO THE CONSTITUTION, VIOLATES THE TENTH AMENDMENT AND IS ILLEGAL.

(a) *This legislation effectuates a direct control over or intermeddling with agriculture.*

We have shown that it is a basic principle of the Constitution that the States should retain exclusive control of their local affairs and that agriculture is fundamentally and essentially local and subject exclusively to State control.

It was said in the *License Tax Cases,* 5 Wall. 462, 471:

> "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers granted to the legislators."

Congress has no authority to interfere or intermeddle with such local affairs. Mr. Justice Holmes in his dissenting opinion in the first child labor case (*Hammer* v. *Dagenhart, supra*) said (p. 277):

> "The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it."

In his opinion Congress in that case was only exercising a power over interstate commerce expressly conferred upon it, and therefore the effect on the local affairs of the States he held was an indirect consequence of legitimate action.

In the present case there can be no question but that the "intermeddling" is direct. We have not here a case where Congress is exercising a power like the power to regulate interstate commerce and the intermeddling with local affairs is an indirect or incidental result thereof. Here we have legislation designed and intended for the sole purpose of intermeddling and controlling. The tax is authorized for the sole purpose of providing funds to carry out the scheme of intermeddling and controlling. The appropriation is authorized solely to enable the scheme to be carried out and the Secretary of Agriculture is authorized to disburse the funds only to those agreeing to or who do carry out the scheme.

The right to tax, as we have shown above, gives no power to legislate for such a scheme. The sole question is whether the right to appropriate money for the "general welfare of the United States" gives a power thus directly to intermeddle with and control local affairs.

The right to control agriculture was denied the United States by the Constitution and confided to the States. To hold that the right to apply money towards agricultural purposes gives it the right to apply money in such manner as to effect control of agriculture would be to hold that the Constitution is wholly inconsistent, since it gives Congress power to control a matter which admittedly it denies it the right to control. Such an interpretation cannot be supported.

(b) *The so-called voluntary character of the control.*

The Government as we understand it does not contend that it has the right under the welfare clause by direct legislation to intermeddle with agriculture or to restrict production. Its contention is that it can under its authority to appropriate money accomplish its scheme of control by inducing the farmers to comply therewith, or

by imposing conditions on the recipients of its appropriations requiring conformity therewith. This method it styles voluntary, and contends that it turns what would be illegal if accomplished by direct control into a legal scheme which is for the general welfare of the United States.

We deny that the plan is in any legal or true sense voluntary; it is a scheme induced by coercion. But even if it were voluntary and the Secretary of Agriculture could obtain the agreements of sufficient persons to carry out the scheme without making any payments to them to induce them to agree, or without any coercion, the scheme, if authorized by the United States, would still be unlawful.

A combination to restrain interstate or intrastate commerce is not lawful because the parties enter into it willingly and without inducement or coercion. Practically all combinations or plans to restrain commerce are voluntary.

A State could not authorize its Secretary of Agriculture to create and enter into a combination to restrict competition or fix prices of agricultural commodities in interstate commerce. The fact that the other parties to the plan enter the combination voluntarily would not be a defense. The State could not authorize such a combination, even though voluntary, because it would be an interference with interstate commerce, control of which by the Constitution is confided exclusively to the hands of Congress. The question of whether the agreement to carry out the plan was or was not voluntary would be immaterial.

Equally, the United States cannot authorize and create a combination to control the production of agricultural products within a State, even though the individuals entering the combination do so voluntarily, because this

is an interference with a local matter the control of which under the Constitution is confided to the states.

Such an interference with local affairs by the United States is permissible only where it is expressly authorized by the Constitution or is a direct or incidental result of the legitimate exercise of a power granted the United States by the Constitution.

(c) *Compliance with this scheme is not voluntary.*

As shown above it is immaterial whether or not compliance with the scheme of control is voluntary or coerced. It may be well to point out, however, that in the present case compliance with the scheme cannot be called voluntary in any legal or practical sense.

The cotton grower is offered his choice of not complying, in which case he will not receive the benefits to be paid by the United States, or of accepting and restricting his production and receiving the benefits. The amount of benefit offered is intended to be sufficient to make it necessary or at least advisable for him to accept as a practical matter. This is one of the principal purposes of the legislation as shown above (*supra* p.). If the cotton grower does not accept, he will receive less for his crops; others receiving the benefits may be able to undersell him, and the consequences may be serious, including not only a loss of profits, but possible bankruptcy and the loss of his farm. This is coercion.

In *Frost Trucking Co.* v. *R. R. Com.*, 271 U. S. 583, which case we consider more fully below (*infra* pp. 194-197), the question was whether the State having the right to permit or prohibit the use of the highways could issue a permit to use to a trucking company conditioned on its acting as a public carrier. The court denied this right and said:

"If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden" (p. 593).

In *Union Pacific R. R. Co.* v. *Public Service Com.*, 248 U. S. 67, the Union Pacific Railroad applied for a certificate of authorization of an issue of bonds secured by a mortgage on its entire line. Only a small portion of its property was in Missouri. A fee of $10,962.25 was charged for the certificate by the Missouri commission, which was a statutory fee fixed by a percentage on the total issue contemplated. It was held that this was an unlawful interference with interstate commerce. The commission contended that the railroad company was under no obligation to get the certificate, and, having applied for it, was estopped to decline to pay the fee. Mr. Justice Holmes held that whether the certificate was necessary or not, it was a commercial necessity in order to enable the railroad properly to sell its bonds. He said (p. 70):

"Of course it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made accord-

ing to interest does not exclude duress. It is the characteristic of duress properly so called."

(d) *What constitutes an illegal interference with local matters?*

As in the case of interstate commerce the precise line between what constitutes illegal interference with the State's jurisdiction and what does not, can most wisely be decided as individual cases arise for decision. Only the general principles need here be laid down and their application to the present case.

(1) Appropriations for purposes over which the State has no control can hardly be called an interference with the State's authority.

On fundamental principles and under the due process of law clause of the Fourteenth Amendment no person can be arbitrarily or unreasonably interfered with in the exercise of his fundamental rights to life, liberty, property.

These rights include the right to devote money to scientific research and investigation, the right to apply money to the promotion of education in accordance at least with methods which do not violate accepted public policy, the right to give property away to relieve suffering or merely to benefit the recipient. None of these acts if performed by an individual could be restrained or controlled by the State. Such control would be arbitrary and would violate the due process clause. They can hardly, therefore, be held an interference with the State's rights or an illegal intermeddling with local affairs, since the State has no jurisdiction over them, and no right to control them.

It may be that other action which has always been recognized as conferring a public benefit and to be en-

couraged as promoting well recognized public policy ought also to be included as not interfering with the State's authority, even though subject to some theoretical control by the State, until the State takes affirmative action and determines otherwise, just as certain matters largely of local concern which affect interstate commerce have been held subject to local legislation until Congress legislated. It is not necessary to decide this in the present case.

(2) Payments made directly to a State, accepted by it and used by it for some plan which it adopts and carries out, may be unconstitutional for some other reason, but would not be unconstitutional on the ground that they are an interference with the State's authority over local matters.

On the other hand, attempts by the United States to directly control matters itself, which are definitely subject to control by the States, and ordinarily are so controlled, are clearly an interference with the State's authority. Especially is this so when the States have by their constitutions, laws or public policy, held that the attempted action is illegal, criminal or against public policy. Since it is not only the exclusive right but the duty of the State to promote the public welfare relating to its internal affairs, and to regulate and control them so far as it deems this advisable, the United States has neither the duty nor authority to attempt directly to control such matters.

7. PREVIOUS LEGISLATION BY CONGRESS AFFORDS NO PRECEDENT FOR THE PRESENT LEGISLATION.

The Government lays great stress on the established practice of Congress. We have shown above that the precedents which support the Hamiltonian doctrine are comparatively recent, and are of no weight in determining

the Constitutional authority of Congress. We shall here show, that none of this legislation relied on by the United States constitutes an interference with the authority of the States in accordance with the principles laid down above and, therefore, constitutes no precedent for the present legislation.

The most that can be said of the precedents is that they show the practice of Congress to appropriate for matters beyond the scope of the enumerated powers. They do not show instances like the present of appropriations made for the direct purpose of carrying out plans to interfere with the authority of the States in violation of the Tenth Amendment and the basic principles of the Constitution.

The so-called precedents may be divided into the following classes:

(a) Appropriations made for matters not in any way related to the internal affairs of the States and which therefore can not constitute any interference with the State's authority, are not in any way repugnant to our system of dual sovereignties or to the Tenth Amendment.

These include the example cited by the Government of the grant by the United States of $50,000 in 1897 to destitute Americans in Cuba, the grant to aid sufferers from earthquake in Japan in 1925 and other grants for similar purposes. These grants it would seem might be justified as proper means to create good will in our foreign relations, etc., but in any event they do not interfere with the State's authority.

(b) Grants for what may be termed charitable or beneyolent purposes, including the relief of distress, education, scientific investigation, etc.

While such appropriations or gifts may relate to internal affairs of the States, yet as we have shown above (if we accept the Hamiltonian theory that the United States can tax for objects beyond the scope of the enumerated powers) they can not be deemed an interference with the State's authority. If these gifts or appropriations had been made by an individual, the State could not control or prohibit them as it would violate the due process clause for a State to restrain a citizen from relieving distress or from educational or scientific research or applying funds for such purposes. Such an application of money, therefore, since not subject to the jurisdiction or control of the States, can not be deemed an invasion of a State's rights.

Under this head are included practically all of the so-called precedents cited by the Government in its brief. They include the following:

(1) Relief of distress due to catastrophe.

Under this head are cited grants "to aid sufferers from earthquakes, Indian depredations, fires, war or famine, tornadoes or cyclones, yellow fever, grasshopper scourges and floods."

These are all purely charitable grants of the character to which the Red Cross devotes its funds.

(2) Health.

Under this head are cited grants for studies in sanitary engineering and rural sanitation, the dissemination of health information, research into the nature and cause of disease, studies designed to promote the safety and health of miners, studies in educational methods, gifts to aid educational institutions and projects, and research and appropriations for the dissemination of information.

Here again we have purely benevolent grants which the States could not prohibit or control.

(3) Social Welfare.

Under this head are cited appropriations to "acquire and diffuse among the people of the United States useful information on subjects connected with labor," appropriations "to investigate and report upon all matters pertaining to the welfare of women," and to publish the results of such investigations, and to investigate and report "upon all matters pertaining to the welfare of children and child life."

Here again are benevolent grants which the States could not prohibit or control.

(4) Agriculture.

Under this head are cited appropriations for the collection of agricultural statistics, distribution of seeds, agricultural experiments and education, the study and eradication of animal diseases, investigation of plant and tree diseases, the study of "plant nutrition and soil fertility."

Here again are purely benevolent purposes.

There is not one of the foregoing matters which a State could constitutionally prohibit or regulate. They constitute no invasion of the State's authority. How strikingly they differ and how weak is the Government's case when they are cited as authority for the present gigantic combination to plow up ten million acres of growing cotton, eliminate forty per cent. of the total land planted in cotton, and to restrict other crops in proportion by agreements induced by benefit payments and entered into with millions of farmers in the country, such contracts being in violation of the constitutions, laws and public policy of the states.

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(5) Certain grants made to the States to be used by the States in carrying out plans which they authorize and execute.

These appropriations are certainly not an invasion of the rights of the States.

These instances of grants cited by the United States therefore afford no precedent whatsoever for the present legislation.

8. SUMMARY OF THE PRINCIPLES INVOLVED AND ITS APPLICATION TO THE PRESENT CASE.

Under our constitutional system neither a State nor the United States can directly interfere, intermeddle with or control matters which under the Constitution are within the exclusive control of any other sovereignty, state or national.

Each sovereignty can exercise the powers which are exclusively conferred on it. Any effect which the normal and proper exercise of such power may have on the affairs of other sovereignties, state or national, is permissible. Such effect is held to be indirect and incidental to the exercise of a legitimate power.

But no direct interference, that is, no interference which is not the incidental result of the exercise of an admitted power, is permitted.

Furthermore, while motives of legislators cannot ordinarily be examined into, on the other hand if the legislation shows on its face that although purporting to be the exercise of an admitted power it is not an exercise of such power for its own sake, but is for the sole purpose of accomplishing something within the control or jurisdiction of another sovereignty (state or national), it will be held illegal. Furthermore, since taxes can only be levied for specified purposes, the purpose set forth in

its legislation must be inquired into, to see if it falls within the authorized purposes.

Still further, it makes no difference if such interference is accomplished by direct action or by indirection or with the voluntary assent of citizens of the sovereignty whose rights are invaded. The principle is applied that:

> "What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." (*Fairbank* v. *United States,* 181 U. S. 283, 294.)

This is "the well established rule." (*Macallen* v. *Mass.,* 279 U. S. 620, 629.)

These principles are applied because they are necessary to preserve our system of dual sovereignties, the basic principle upon which our Constitution and its system of government is founded. If this principle could be defeated by direct or indirect assault, the sovereignty of our individual governments would be impaired or destroyed and the system devised by the Constitution would collapse.

A further principle is applied to insure the preservation of the system. Where two powers possessed by two sovereignties (state and national) which considered apart from other provisions of the Constitution, or, if taken literally, would be in apparent conflict, they are interpreted in accordance with the spirit and intent of the Constitution as a whole; that is, a "practical construction" or interpretation is applied which "will not nullify or substantially impair" either power and will permit so far as possible each government to "administer its affairs within its own sphere . . . free from undue interference by the other." (See *supra* pp. 48, 49.)

Application of these principles to the present case.

In the present case we have under the Hamiltonian theory on the one hand a power to tax for certain purposes, namely, to pay the debts and to provide for the common defense and for the general welfare of the United States, and to appropriate or apply the proceeds to such purposes.

We have, on the other hand, the basic principle of the Constitution which requires that States should have exclusive control over local affairs which includes agriculture, and the Tenth Amendment which emphasizes this principle and expressly provides for such control by the States.

We have before us legislation, the sole and direct purpose of which by its terms is to directly restrict and thus control the production of agricultural commodities on a vast scale, and thus intermeddle with and control a matter of exclusive State jurisdiction.

We have, in addition, the circumstance that if the principle of this legislation is recognized as legal, Congress can cause the adoption in a State of practically any policy with reference to its internal affairs which Congress desires to put into effect, provided only Congress is willing to offer sufficient benefits to induce or coerce its acceptance, and therefore, if the principle is recognized, it results in Congress having power for practical purposes to impair if not destroy the authority of the States over their local affairs.

To hold that the welfare clause permits Congress to appropriate money for the express purpose, and in such manner as to control agriculture in the States, would mean that the framers of the Constitution, having expressly denied to Congress the right to control agri-

culture, gave Congress, nevertheless, by the application of money, the very right it had expressly denied it.

We must also consider that the asserted right of the United States to use the power to appropriate money for the purposes of controlling matters which it has no authority to control directly, and thus to accomplish a purpose clearly not intended by the Constitution, must be supported on the ground that such a purpose can be regarded as promoting "the general welfare of the United States."

Chief Justice Marshall in *Dartmouth College* v. *Woodward*, 4 Wheaton, 518, 629, said:

> "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."

Under these circumstances can there be any doubt as to the proper interpretation of the clause we are now considering, or that the right to appropriate the proceeds of taxes for the general welfare of the United States can not include the right to appropriate for the direct purpose of impairing or interfering with the authority of the States over their local affairs?

9. CASES WHICH FULLY SUSTAIN THE PRINCIPLE ABOVE STATED.

THE CHILD LABOR CASES.

The first Child Labor case, *Hammer* v. *Dagenhart*, 247 U. S. 251, establishes the foregoing principle completely and for this reason we ask the indulgence of the court to analyze it at some length. The principle laid down in the dissenting opinion in that case delivered by Mr.

Justice Holmes and concurred in by three other justices, also sustains the illegality of the present legislation.

In the Hammer case Congress passed legislation forbidding the transportation in interstate commerce of manufactured goods produced in any factory in which within thirty days of shipment children under certain ages were employed. The court said:

> "The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States" (pp. 271-272).

The court therefore held the Statute unconstitutional and in the course of its opinion said:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.
>
> "The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution" (pp. 273-274).

So, in the present case, the right of Congress to appropriate money for purposes related to the general welfare of the United States was clearly not intended to enable Congress to control matters which the States are exclusively authorized to control in the exercise of their police power over agriculture.

The court further said, at pages 275, 276:

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. (Cases cited.) To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States. . . .

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority."

Mr. Justice Holmes in his dissenting opinion said (p. 277 *et seq.*):

"The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of

direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

"The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects, and that if invalid, it is only upon some collateral ground. The statute confines itself to prohibiting carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued to-day that the power to regulate does not include the power to prohibit. . . .

"The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. . . .

"The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States."

We wish first to point out the similarities between the Hammer case and the present case.

In the Hammer case we have legislation by Congress forbidding the transmission in interstate commerce of certain goods. The purpose as shown by the act is to restrict or prohibit child labor in the States. Such labor was not, however, prohibited directly. It was sought to be controlled by offering a privilege or benefit —namely, the right to ship in interstate commerce—to those who conformed. Each manufacturer was free to conform or not as he pleased. If he did not conform, he did not receive the privilege. The majority of the court held that the effect on child labor as shown by the act was the direct purpose, and therefore the direct effect of the act, and not the indirect effect of the lawful exercise of an admitted power since the exercise of such power solely for an ulterior purpose, was an unlawful exercise of the power.

In the present case Congress undertakes to use the power of appropriating money for the express, sole and direct purpose of restricting and thus controlling agriculture. It offers a privilege—a grant of money—to those who conform to its plan and denies it to those who do not conform. The cotton grower is free to conform or not as he pleases.

It is clear that under the principles laid down in the majority opinion in the Hammer case the exercise of the right to appropriate for the direct purpose of effecting this unlawful result must be held invalid.

The present case is, however, much stronger than the Hammer case. Here we have no purported exercise of a legislative power, the indirect but lawful effect of which might be to regulate agriculture. We have here only the right to appropriate. **The effect on agriculture could not possibly be deemed the indirect effect of the right to**

appropriate money. The money was appropriated for this express purpose, and the effect to be produced was the express and direct effect of the appropriation and could not by any possibility be called its indirect effect (see *supra* p. 175).

For this reason the present legislation is also unlawful under the principle laid down in the minority opinion.

Mr. Justice Holmes said that direct intermeddling with methods of production in a State is unlawful. In the Hammer case he said Congress was merely exercising its admitted right to regulate interstate commerce, which included the right to prohibit transportation in interstate commerce, and that, such being the case, the motive or real purpose of Congress would not be considered even though it was apparent on the face of the act.

In the present case, however, he could not say this. Here we are dealing with an appropriation and not a legislative power. An appropriation can only be made for a purpose. Congress can not merely appropriate money; it must necessarily state the purpose of the appropriation. The validity of the appropriation depends on the purpose and hence the purpose must be examined into. Further, the purpose of the appropriation determines necessarily its direct effect. Thus, in the present case Mr. Justice Holmes would clearly agree that the purpose must be inquired into and that the direct purpose and effect sought to be accomplished was the intermeddling with agriculture.

BAILEY v. DREXEL.

In *Bailey* v. *Drexel*, 259 U. S. 20, the second child labor case, Congress imposed a tax on the profits of those employing child labor with an exception in case of ignorance by the employer of such employment.

The court held that the so-called tax was imposed to prohibit the employment of children and that this motive should be taken into account since the law showed on its face "the detailed specifications of a regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation;" (p. 42). * * * "The so-called tax is a penalty to coerce the people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State government under the Federal Constitution" (p. 39).

Here we again have legislation offering a privilege, namely, an exemption from taxation to those who conform to the scheme, they being free to conform or not as they please. There is no direct prohibition. Action is voluntary in the same sense that it is voluntary in the present case. Yet the court calls the effect coercion and the legislation unlawful as an invasion of the rights of the States.

HILL v. WALLACE.

In *Hill* v. *Wallace*, 259 U. S. 44, the same principle was applied in holding the Future Trading Act unconstitutional which imposed a tax on contracts for the sale of grain for the purpose, as shown on the face of the act, of regulating the business of grain boards of trade.

In *Hill* v. *Wallace* the court distinguished *McCray* v. *United States* (*supra*) and similar cases on the ground that "in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law detailed regulation of a concern or business wholly within the police power of the state with a heavy exaction to promote the efficacy of such legislation."

CASES INVOLVING THE RIGHTS OF STATES TO GRANT OR WITHHOLD PRIVILEGES IN ORDER TO OBTAIN COMPLIANCE WITH MATTERS BEYOND THEIR JURISDICTION.

There are numerous cases applying this same principle to State legislation and holding that a State, although it has the absolute power arbitrarily to withhold or grant a privilege, can not use such power to induce the doing of some act which the State can not control or make the grant to a person or its withdrawal of the privilege from the person conditioned on such person conforming to action which the State can not directly control because such control is within the jurisdiction of another State or of the United States, or is a control which cannot be exercised by the State because of a constitutional prohibition. The fact that the person whose conduct is influenced or controlled is free to conform to what the State wishes or not as he pleases is no defense.

The States being as sovereign in respect to the matters committed to their charge, as is the United States, the principle of their right thus to control matters constitutionally beyond their jurisdiction is equally applicable to the right of the United States to control matters beyond its jurisdiction. In *Worcester* v. *State of Georgia,* 6 Peters 515, 570, the court said:

> "The powers exclusively given to the federal government are limitations upon the state authorities. But, with the exception of these limitations, the States are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power."

The principle is very clearly stated in *Frost Trucking Co.* v. *R. R. Commission of Cal.,* 271 U. S. 583. The

question in that case was whether the State had power to withhold a permit to use the highways from a private contract trucking company unless it became a public carrier. The court held that a private carrier can not, consistently with the due process clause, be converted against his will into a common carrier by the State. The question therefore was whether the State, by reason of its power, which the court for the purposes of the case admitted, of prohibiting the use of the highways, could so bring about the result which it could not accomplish by direct legislation. The court said (p. 593 *et seq.*):

> "There is involved in the inquiry not a single power but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter separately and substantively must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring the surrender which, though, in form voluntary, in fact lacks none of the elements of compulsion. . . .
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state,

having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence."

In this case we have what is regarded as an absolute right by the State to prohibit or permit the use of its highways. We have also the principle that a State can not compel a private contract carrier to become a public carrier. The State seeks, however, to induce the contract carrier to become a public carrier by offering it a privilege which the State has the right to grant or withhold. The contract carrier is free to accept or not as he pleases. There is no constitutional restriction against his becoming a public carrier. The decision is entirely within his control. But this case holds that a State can not use its power, however absolute it may be, for the purpose of bringing about a result which it has no jurisdiction directly to order or control.

So in the present case the United States is attempting by the use of the right to appropriate money, to bring about a restraint of agriculture which is a subject matter entirely beyond its right to control and the control of which is entirely within the jurisdiction of the States.

In the Frost Trucking Co. case the court quotes with approval the dissenting opinion of Mr. Justice Bradley in *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, which is now the law, as follows:

"Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions on their doing so * * *.

"The whole thing, however free from intentional disloyalty, is derogatory to the mutual comity and respect which ought to prevail between the State and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance" (pp. 595, 596).

In *Looney* v. *Crane Company,* 245 U. S. 178, it was held that although the State had an absolute right to permit or refuse to permit a foreign corporation to do business in the State, it could not issue a permit only on condition that the grantee would pay a license tax for such permit based on its assets outside the jurisdiction of the State which therefore the State could not directly tax. The foreign corporation was free to accept the permit or refuse it. By a mere money payment it could obtain the permit. It was held, however, that the State could not use its right or privilege, however absolute, to accomplish a result which it could not accomplish directly because constitutionally beyond its jurisdiction.

In the Looney case the foreign corporation to obtain the privilege was only required to pay a comparatively small sum of money which it was entitled to pay if it chose. The public generally was not affected by the payment. In the present case the farmer in order to obtain the privilege is required to join a gigantic combination to drastically restrict production, which violates the Constitution, laws and public policy of most if not all of the States.

In *Terral* v. *Burke Construction Co.*, 257 U. S. 529, the same principle was applied in holding that the State could not revoke a permit to do business merely because the foreign corporation had resorted to the federal courts. The State had the absolute right to withdraw or withhold the privilege. The corporation had the right to resort to the federal courts or not as it pleased. It could not be induced, however, by the State to give up its exercise of this right by conditioning the benefit on its not exercising its right, because the control of whether it resorted to the federal courts was beyond the jurisdiction of the State.

In *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, the principle was applied to a matter of trivial importance. In that case a statute of the state of New Mexico made it unlawful for any insurance company to pay a fee to a person not a resident of New Mexico for placing insurance on property in New Mexico. It was provided that the permit to do business of a company paying any such fee should be withdrawn. Here again the court held that the legislation was unconstitutional on the ground that although the use of its legislative right to withdraw a privilege was within the State's power to grant or refuse, it attempted to regulate a matter outside its jurisdiction. Mr. Justice Holmes speaking for the court said (p. 434):

> "Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as a part of a scheme to accomplish a forbidden result. *Frick* v. *Pennsylvania*, 268 U. S.

473. *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta,* 256 U. S. 350, 358. *Badders* v. *United States,* 240 U. S. 391, 394. *United States* v. *Reading Co.,* 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, *Terral* v. *Burke Construction Co.,* 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 203; *Looney* v. *Crane Co.,* 245 U. S. 178, 188. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company has tracks and does business in the State making the attempt. *New York, Lake Erie & Western R.R. Co.* v. *Pennsylvania,* 153 U. S. 628, 646."

In this case the right sought to be controlled was not subject to state control solely because it was an act performed outside the jurisdiction of the State. It was an act of comparatively trivial importance which did not involve any real question of public policy. The legislation was unconstitutional because the State had no right by the exercise of its undisputed power to admit or exclude, to attempt to control this trivial matter outside of its jurisdiction.

SUMMARY OF THE FOREGOING CASES.

The foregoing cases conclusively establish the principle that although a sovereignty (state or national) has an absolute right to grant or withhold a privilege it can not grant or withhold such privilege for the purpose of inducing action which is beyond its jurisdiction to con-

trol, either because such control is confided to the jurisdiction of another sovereignty, or because such control is prohibited by a constitutional limitation.

The present case falls clearly within this principle. The right to appropriate is used by the United States for the direct purpose of inducing action which is beyond the jurisdiction of the United States and is within the exclusive jurisdiction of the States.

OTHER CASES ESTABLISHING ANALOGOUS PRINCIPLES.

It is a fundamental principle of constitutional interpretation that any action by the United States or the States which is repugnant to the intent of the Constitution is unconstitutional.

Thus, although the United States, by the express wording of the Constitution, is given an unlimited right to lay excises for its governmental purposes in respect to any subject matter whatsoever, without any limitation, it has been held that by implication this broad and apparently unlimited right is subject to the restriction that the United States shall not tax the instrumentalities of the State, since by doing so it could interfere with or destroy the State or prevent it from accomplishing its proper functions, which would be repugnant to the spirit and intent of the Constitution.

The Collector v. *Day*, 11 Wall., 113.

In other words, the broadest kind of right expressly granted to the United States by the Constitution is qualified and must be limited where its exercise would be repugnant to the intention of the Constitution.

In the present case, on the same principle, it is clear that if the United States, as the Government contends, has the unqualified right to appropriate tax money for any purpose it pleases, such right by implication must

be restricted where its direct exercise is used to control a matter expressly reserved to the States.

Numerous other cases hold that a State, although acting within its apparent field of power, cannot use such right to discriminate against Interstate Commerce. Thus, the Inspection Laws of a State which are exercised under the power to protect public health, cannot be so exercised as to discriminate against imports from another state.

Minnesota v. *Barber,* 136 U. S. 313.

Bremmer v. *Redman,* 138 U. S. 78.

Voight v. *Wright,* 141 U. S. 62.

On the same principle, in the present case, if the United States has the unqualified right of appropriation, it cannot be so exercised as directly to exert control over agriculture which the United States is not authorized to control.

10. CONTENTION BY THE GOVERNMENT THAT NO CONTROL IS EXERCISED BY THIS LEGISLATION.

The Government contends that "no power of control over or regulation of agriculture has been asserted, but that, to the contrary, steps authorized by this Act and taken under it do not go beyond the appropriation and spending of the money". (Government Brief, p. 264.)

It bases this statement—*first*: on the contention that the compliance with the scheme of production is purely voluntary; and *second*: on the ground that the legislation contemplates that the Secretary would do no acts which are not legal under the laws of the several states.

We have sufficiently answered above the contention that the carrying out of the plan by granting benefits to those who comply and refusing benefits to those who refuse to comply, is not an exercise of control.

The contention that the Secretary of Agriculture is only authorized to carry out the scheme in States where

such a scheme would be lawful if subject to the laws of the States, in other words, where such a scheme would be lawful if carried out by an individual, is immaterial if correct, but it is not correct. An attempt to control matters beyond the jurisdiction of the United States is unconstitutional, not only where it is contrary to the laws of the various States, but also merely because it is the exercise of a control, which control has not been granted to the United States, and for this reason it is beyond the power of the United States, and therefore unconstitutional.

Furthermore, the contention that the Secretary of Agriculture was to put his plan into effect only in those states where the law permitted such a scheme is wholly inconsistent with the legislation. It is clear that the scheme approved by the legislation could not be made effective or carried out unless applied generally—the Secretary would defeat the purposes of the Act if he only reduced production in some states and left it unrestrained in others. The Act would obviously not have been passed unless it could be applied everywhere.

The major policy of the Act (Section 2) is to establish and maintain a balance "between production and consumption of agricultural commodities, and such marketing conditions therefor as will re-establish prices to farmers." The justification for the legislation is stated in the Declaration of Emergency which sets forth that the prevailing prices of agricultural commodities have destroyed the purchasing power of the farmers for industrial products, impaired agricultural assets supporting the national credit structure and affected transactions in agricultural commodities with a national public interest, and obstructed the normal currents of commerce in such commodities. The Secretary is given authority by Section 8, sub-section (1), to provide for the limita-

tion of production for the express purpose of effectuating the policy of the Act. He is given further power, with the approval of the President, "to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title." It is quite clear that the Act contemplates its being carried out under the powers claimed by the United States, and regardless of State laws, and that it could not otherwise accomplish its objects. The administration of the law has coincided with this view. The Secretary has proceeded to put the plan into effect, regardless of the laws of the States under which such a combination to limit production is unlawful.

XIV.

CONTENTION THAT CONGRESS HAS POWER TO REGULATE AGRICULTURE TO CARRY OUT THE FISCAL POLICIES OF THE UNITED STATES.

The Constitution confers power to borrow money, levy taxes, coin money and regulate the value thereof, which powers considered together the Government refers to as the fiscal powers of the United States. The United States, of course, also has implied power to collect the taxes and other receipts of the Government and to disburse them for various governmental purposes.

Under these powers the National Banks, the Federal Reserve Bank, and the Federal Land Banks and Joint Stock Land Banks have been authorized. The latter are authorized to make agricultural loans. The plight of the farmer is such today that the Government contends these banks have found difficulty in collecting their loans, that they have many frozen assets and cannot turn over their assets rapidly, so that credit is contracted.

Having created these banks with the power to make agricultural loans, it contends that Congress has power to preserve them.

The argument then proceeds that by restricting and regulating agriculture, as provided for in the present legislation, farm property will increase in value, farmers will be able to pay their mortgages; this will benefit the banks set up by the Government and make them more effective, enabling them to sell their bonds so as to increase their assets and thus supply additional credit, and carry out their policies more effectively. The Government has also invested money through the Recon-

struction Finance Corporation in twelve regional agricultural credit corporations. The Government says,

> "Only by increasing the purchasing power of the farmer could the large investments which the federal government has made in this field ever be liquidated and the stability of the financial system be restored."

The trouble with the Government's contention is that it proves too much.

The United States in *M'Culloch* v. *Maryland,* 4 Wheat. 316, and *Osborn* v. *Bank,* 9 Wheat. 738, was held entitled to establish banks. It was admitted that the Constitution granted no express power to form such corporations but it was held that the organization of such banks was permissible because it was an appropriate means to carry out the Government's fiscal policies.

The Government collects in taxes each year large sums of money in the various parts of the country; it must keep, transport, and disburse these sums, and engage in other similar financial operations. It, of course, must have power to conduct these operations. It could conduct them itself, if it saw fit to do so, through its own employees. It was held that to conduct them through banks was a reasonable, appropriate method, and for this reason the Government was authorized to create banking corporations for the purpose.

Having decided to create a corporation or corporations for the purpose, in order that such banks might be efficient and economical, it was held that they might be authorized to engage in the general banking business in the same manner as other banking corporations which the United States might use for the purpose of aiding in its financial operations.

In *M'Culloch* v. *Maryland, supra,* Chief Justice Marshall, in speaking of the fiscal operations which the Government had to conduct, for which a bank was an appropriate means, said,

> "Throughout this vast republic from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive?" (p. 408).

In *Osborn* v. *Bank, supra,* Mr. Justice Johnson, in referring to the fiscal policies of the bank, said:

> ". . . it is now become the functionary that collects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury;" (p. 872).

It was these fiscal operations, absolutely essential to government operations, which the court held in these cases justified the creation of banks.

Authority to create the Federal Land Banks and the Joint Stock Land Banks was based on the same premises. The court in *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, sustaining their validity, said,

> "We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositaries of public moneys and purchasers of Government bonds, brings them

> within the creative power of Congress, although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities, destroyed the authority of Congress to create those institutions."

In other words, Congress is authorized to create banks as agencies through whom it may conduct its fiscal operations and, in order that such banks may be efficient, it may give them the additional powers normally exercised by banks. In the same way, if Congress should construct an interstate railroad it would have authority, in order that the railroad might operate economically and reasonably, to permit it to conduct the ordinary intrastate business which an interstate railroad normally conducts.

The contention that the Government now makes is that because Congress is authorized to create banks as an appropriate means to conduct the Government's fiscal operations and authorize such banks to conduct normal banking business, it may, in order that such banks may be successful, regulate and control any industry in which they may invest their money. Because the banks and other governmental agencies hold about eighteen per cent of the total farm mortgage debt, Congress, it is contended, may regulate the entire agricultural industry. The Government does not limit itself to provisions respecting the collection or liquidation of the particular mortgages which these banks may hold, but contends it is authorized to regulate all agriculture.

If this principle is sound, the Government, having constructed a railroad under its interstate commerce authority, could, in order to make such railroad successful and give it enough business to support it, regulate all intrastate industry which might furnish it with business. Or, having created the national banks which lend money to practically every industry in the country, it can, in order to protect such banks, regulate intrastate industry of every character.

We submit the contention does not justify further discussion.

XV.

THE PROCESSING TAXES VIOLATE THE DUE PROCESS OF LAW PROVISION OF THE FIFTH AMENDMENT.

Under the Fifth Amendment, no person can be deprived of property without due process of law. This provision is applicable to the taxing power.

It is not due process of law to take, without compensation, the property of one person or a class of persons by taxation or otherwise in order merely to hand it over to another person or class of persons.

In the case of a tax raised for a particular purpose, as in the present case, the purpose for which it is to be applied, must be a public purpose.

In *Jones* v. *City of Portland,* 245 U. S. 217, 221, the court said,

> "It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State."

See also *South Carolina* v. *U. S.,* 199 U. S. 437, 451.

The ground on which taxation is justified is that every person is liable to contribute to the public treasury, funds to be put to public use. The right to tax the individual is based on his obligation to contribute to such public purposes, including the maintenance of the Government, and the consideration he receives is his interest in the maintenance of the Government and the public services so furnished by or through the Government. If taxes are levied on him for a private use, he is under no obligation to contribute and he cannot be deemed to have re-

ceived a benefit and his property is arbitrarily taken without compensation.

Is the present purpose a public purpose?

To determine this, we must ascertain why and for what purpose the payments provided for in the present legislation are made to cotton growers. This question, we have fully considered above (*supra,* pp. 21-6). The payments are made to cotton growers to enable them to receive a "fair share in the national income". This is to be accomplished by direct cash payments to those who agree to restrict their production. The payments add to the cotton growers' income and the restriction enables them to get higher prices for the restricted production. The objective is to give cotton growers the same relative purchasing power or share of the national income for their products which they had in the period 1909 to 1914.

It is contended that if farmers receive this increased share of the national income they will purchase more manufactured or other goods and thus indirectly increase general prosperity. The following points are to be noted:

1. The payments are not made to farmers as objects of charity. Recipients of benefits are not selected on the ground of their poverty. The richest man in the country, if a cotton grower, is requested and is entitled to join in the plan and receive benefits.

2. The cotton growers are not paid to perform or provide any direct service to the public. They are not asked to produce more products required by the public; on the contrary, they are required to produce less. They are not asked to do a single thing which can in any conceivable way be regarded as a direct service to the public; on the contrary, they are given a cash benefit in order that they may do less work so as to enable them to charge the public more for what they do produce.

In other words, the cotton growers are paid to do something which is for their own interests and involves no sacrifice on their part or any direct service to the public. On the contrary, the direct immediate effect is a decrease of supply, and an increase in prices—a detriment to the public.

3. The purpose of the plan is to give "a fair share of the national income to the cotton growers" (*supra*, p. 26), but the money used for this purpose is not taken from the incomes of those who have more than the farmers and given to the farmers so that they will have more nearly an equivalent income. There might be some social justice, if not constitutional authority, if incomes in excess of a certain amount were taken from one class and given to another class having smaller incomes in order to equalize them.

But, in the present case, the tax is not an income tax or a tax on income in excess of a certain amount. The taxes are imposed on cotton manufacturers no matter how much money they may be losing. The plan does not propose to equalize incomes, but to take money or property from the cotton manufacturers whether or not they have any incomes and pay it over to the farmers in order that the farmers may have an income.

It is a well known fact that for a decade the cotton textile industry on the whole has been losing rather than making money. The situation became so disastrous that the President on March 26, 1935 appointed a committee composed of cabinet members to investigate conditions in the industry. Their report was submitted by the President to Congress on August 21, 1935 (*Cotton Textile Industry, 74th Congress, 1st Session, Document No. 126*). This report shows the unfortunate conditions in the textile industry. One can not read it without con-

viction that this industry needs help as much as the cotton growers. To illustrate the report shows that in the period July 1 to December 31, 1934 out of 457 cotton mills comprising the principal cotton textile mills in the country, 300 sustained losses and only 157 made profits. (Report, p. 61.) During this period the cotton manufacturers became liable for over $50,000,000 in processing taxes necessarily paid for the most part out of capital and used for the purpose of giving the farmers a "fair share of the national income" or profits.

But this is not all. The cotton growers, receiving these taxes so paid out of the capital of the cotton mills, have agreed to reduce the cotton available for sale so as to increase the cost of this product which the mills must purchase. The plan is to increase the cost by at least six cents a pound, or over $150,000,000 a year for the cotton domestically consumed. Thus, so far as the plan is successful, the cost to the cotton textile industry will be over $150,000,000 a year for increased cost of cotton and over $100,000,000 a year in processing taxes, a total of over $350,000,000 a year. The total value of product of the cotton textile industry in 1933 was $861,170,352. (*cf.* note p. 5.) These additional taxes must be paid regardless of whether the mills make any profits.

It is, of course, contended that the mills will pass the tax on to their customers. Of course, they will, to the extent that they can do so, but to what extent they can is another question. The tax is a direct tax on the manufacturers, payable by them whether or not they make any profits and whether or not they are able to include all or any part of the tax in their prices to the public. Furthermore, to the extent the tax can be passed on to the public, it is passed on to every class in the community and not merely to those who have an income equal to the farmers.

All classes of persons necessarily buy cotton goods, including the very poor.

4. The contention that the increased purchasing power thus given the farmers will enable them to purchase more manufactured goods and thus increase general prosperity merely means this: By taking property from Class A and giving it to Class B, Class B will have more purchasing power and will therefore spend more money and thus indirectly add to the general prosperity. This is merely distribution of wealth by governmental decree.

The fact stated above—that the cotton manufacturers are required to pay these immense sums, whether or not they make any profits, to the farmers for the purpose of giving the latter "a fair share of the national income"—is a simple fact. Whether the economic theory that this will increase general prosperity is sound is another question which is not, perhaps, material. We have discussed it in the note at pages 27-29, *supra*.

Can a reduction of production increase national income; if not, how can the reduction of production provided for by this legislation aid the public generally? How can a price be determined which will give the farmers the same relative purchasing power for their products as before the war, since the cost and labor involved in producing agricultural commodities and the character and cost of most articles farmers buy has radically changed? Why is the relative pre-war purchasing power which farmers had, even if it could be determined, a fair basis for division of the national income today? These are some of the questions discussed above.

In any event, we do not deem them material. Whether or not general prosperity is aided by such transfer of

purchasing power, it is clear that it is an indirect result only and that it is sought to be accomplished by a transfer of property from the manufacturers, regardless of the amount of income they have, to the farmers who are not required to render any direct service to the public in exchange, the only service rendered being the agreement to restrict production, the direct result of which is to aid the farmers by increasing their prices and consequently to increase the cost of farm products to the public.

We respectfully submit that a transfer of property from one class to another for such purposes is clearly not for public purposes, as recognized by the law.

In *Allen* v. *Smith*, 173 U. S. 389, the bounty for sugar which was sustained in *United States* v. *Realty Co.*, 163 U. S. 427, as the recognition of a moral obligation to those who had planted their crop the previous year on the faith of the bounty law then in existence, whether or not such law was legal, was under consideration. The question was whether the payment should go to the manufacturer of the sugar or to the grower of the cane. The court held that the bounty was intended for the manufacturer of the sugar in consideration of his manufacturing it. Otherwise, the court held it would be a mere donation. The court said,

> "This disassociates the bounty altogether from the motive which actuated Congress in granting it, and turns it into a mere donation of so much money, which it can not be presumed to have made, even if it had the power. Bounties granted by the government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or

moral obligations to be recognized. To grant a bounty irrespective altogether of these considerations, would be an act of pure agrarianism;" (p. 402).

In the present case, we have no direct service to be rendered to the public but action only, which it is admitted, is for the farmers' own interest. Benefit payments are, therefore, a pure gratuity.

In *Loan Association* v. *Topeka,* 20 Wall. 655, it was held that bonds issued by a municipality to induce a bridge company to locate in the municipality were illegal since the money must be raised by taxation and the purpose would not be a public purpose. The court said,

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

"Nor is it taxation. . . . 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.'

". . . If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pur-

> suit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving of aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town'' (pp. 663, 664, 665).

In this case, the recipient did give consideration by the operation of a factory in the municipality which presumably otherwise would not have been operated, and he did furnish bridges to the public, employment to the inhabitants of the municipality, and maintained property which the municipality could tax. In the present case, the farmer is restricting the products he offers to the public, taking taxable land out of cultivation, and throwing farm laborers out of employment.

In *Parkersburg* v. *Brown,* 106 U. S. 487, the City of Parkersburg was authorized to issue bonds for the purpose of lending the proceeds to persons engaged in manufacture, the money to be repaid. This was held unconstitutional since the money to pay the bonds might have to be raised by taxation. The court said,

> ''Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person'' (p. 501).

In this case, as in the *Topeka* case, the manufacturer was to furnish a consideration by maintaining a manufacturing plant.

In *Cole* v. *La Grange,* 113 U. S. 1, the Constitution of Missouri authorized the issue of municipal bonds to aid manufacturers. The court said,

> "The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It can not, therefore, authorize them to issue bonds to assist merchants or manufacturers whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject" (p. 6).

The court pointed out that aid given public utilities such as railroads and grist mills has been sustained on the same ground that the right of eminent domain has been justified, namely, that these furnish an essential or necessary public service and are, therefore, to be distinguished from cases of aid to private business which is not ordinarily a matter of public necessity. It is to be noted, however, that in both cases some consideration or service was rendered which differentiates both from the present case.

The principle has been sustained in many cases in the State courts. In the leading case of *Lowell* v. *Boston,* 111 Mass. 454, the City of Boston was authorized to issue bonds to raise funds to render aid by way of loans in rebuilding a portion of the city burned in the great fire of 1872. The court held that taxes to be raised for this purpose would not be raised for a public purpose. The court points out clearly that a purpose to be public must furnish some direct public service to the community and that the indirect benefits which might ensue from a private business furnishing employment and otherwise aid-

ing in producing prosperity can not turn what is a direct private purpose into a public purpose. The court said,

> "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. **It is the essential character of the direct object of the expenditure which must determine its validity,** as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.
>
> "The principle of this distinction is fundamental. It underlies all government that is based upon reason rather that upon force. . . .
>
> "an appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway, is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community,

> to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. . . . But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation'' (pp. 461, 462, 463).

In certain other cases the right of a State to raise taxes in order itself to engage in business which has usually been considered of a private or semi-private character has been contested. Quite a different principle is here involved. The State in such case furnishes a direct service to the public. The question is whether the State may furnish this character of service, which is ordinarily furnished by private individuals, and which doubtless would be so furnished if the State did not provide therefor. The question is quite different from cases of furnishing money to private individuals for businesses of a private character so that they may make a profit even though in consideration thereof they also furnish a service.

In *Jones* v. *City of Portland,* 245 U. S. 217, it was held that the City of Portland could engage in the business of selling coal to the inhabitants at cost. The court stated its reluctance to interfere with the right of a State to determine what was a public purpose. It stated that States and municipalities could furnish light and water and also natural gas for heating purposes, which were recognized as public purposes and that, therefore, it saw no reason why the municipality should not also furnish heat in a different form by such means as were necessary, heat being as indispensable to the health and comfort of the people as light or water. Here a direct service to the public was rendered by the municipality.

In *Green* v. *Frazier*, 253 U. S. 233, the same principle was applied to the legislation of the State of North Dakota providing that the State, through corporations organized for the purpose, might engage in banking, manufacture and marketing of farm products and furnishing grain elevators and home building operations. It was shown that ninety per cent of the wealth of the State was produced from agriculture and that a large proportion of the people were tenants moving from place to place for whom it was desirable to furnish homes.

The court reiterated its reluctance to interfere with what the Constitution and laws of the State deemed a public purpose and held this legislation did not violate due process. It pointed out that the State was furnishing a direct service to the public:

> "This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Loan Association* v. *Topeka*, 20 Wall. 655-665" (p. 242).

The court also laid stress on the peculiar conditions existing in North Dakota, emphasized in the opinion of its highest court. Here, of course, we again have a direct service furnished to the public by the State itself and the benefit to the public is not the indirect result of a business conducted by private individuals.

In the recent Railroad Pension Case (*Railroad Retirement Board* v. *Alton R. Co.*, 55 Sup. Ct. Rep. 758), one of the objections to the act was that the railroads were treated as a single employer so that pensions from employees of one railroad might be paid out of funds furnished by another. In that case it could also be contended that it was a public benefit that retired railroad employees should have pensions as this would result in their spending money which would aid a more general

prosperity, just as in the present case. The court, however, said,

> "There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees" (p. 765).

We respectfully submit that while the application of the principle involved in these various cases is not precisely defined in all cases, the following limitation appears clearly established.

When money is raised by taxes to be paid to private individuals, it is not a public purpose unless they render some direct service or benefit to the public in return. An indirect benefit which results merely from the fact that the recipients by reason of the payments to them are more prosperous and therefore by spending more money tend to make the community more prosperous is not sufficient to make the payments a public purpose.

The purpose of this legislation—to take property from cotton manufacturers, and pay it to farmers in order to give the farmers what Congress deems a fair share of the national income—is not a public purpose or due process. It is aggravated in the present case by the fact that the money is not taken from the income of the cotton manufacturers for the purpose of equalizing income but is taken from them regardless of whether they have any income in order to provide an income for the farmers.

XVI.

SINCE THE PLAN FOR RESTRICTING AGRICULTURE PROVIDED FOR IN THIS LEGISLATION IS UNLAWFUL AND SINCE THE PURPOSE IS NOT A PUBLIC PURPOSE, THE TAXES IMPOSED TO CARRY IT OUT ARE UNLAWFUL.

The plan for restricting the production of cotton, as we have shown above, is unlawful and the benefit payments are made for the express purpose of carrying out this unlawful scheme and, further, are not for a public purpose. Since the taxes are levied solely for the purpose of paying the benefits and thus for the direct purpose of carrying out this unlawful plan, they are necessarily unlawful.

An illegal or unconstitutional tax can not be collected, whether the tax is illegal because levied on an object which it is not within the power of Congress to tax or is for an unlawful purpose.

That the taxes are levied for the sole and direct purpose of carrying out the unlawful plan is undoubted. They go into effect when, and only when, the Secretary of Agriculture determines that the benefit payments are to be made; the Act provides that they shall cease when the benefit payments terminate; they are appropriated for the purpose of paying these benefits which are the heart of the plan and are made solely for the purpose of carrying out the plan.*

*NOTE. "Estimated collections and expenditures covering commodity programs in effect or in process of approval for marketing periods indicated" (*Report*, p. 278, table 34). Cotton, Aug. 1, 1933—July 31, 1935; Collections: Processing tax, $237,000,000; Compensating tax, $22,000,000, total, $259,000,000. Expenditures, rental and benefit, $242,236,000; Removal of Surplus, (nothing); Balance, $16,764,000; less administrative expenses chargeable to commodity program, $10,527,757; balance, $6,236,243.

Since the right of the United States to levy taxes is, as we have shown above, a limited right—the right to levy taxes only for specified purposes—and as the carrying out of this unlawful scheme is not included within these purposes, and further since it is not a public purpose, it necessarily follows that the taxes are unlawful.

The cases of *Massachusetts* v. *Mellon* and *Frothingham* v. *Mellon,* decided in one opinion (262 U. S. 447), have no application, as the Government urges, to the present case.

The suit brought by Frothingham did not involve the question of whether an illegal tax could be collected. It involved only the question of whether officers of the United States Government could be enjoined from disbursing moneys from the treasury which had been appropriated by Congress for purposes alleged to be unconstitutional, on the ground that such payments might thereafter affect the plaintiff if, on account of such payment, it thereafter became necessary to assess taxes and taxes were assessed which, because of their nature, might affect Frothingham as a taxpayer.

In the *Mellon* case, the State of Massachusetts and a citizen of the United States brought suits to enjoin the Secretary of the Treasury and other Government officers from carrying out the Shepard-Towner Maternity Act which provided for payments by the United States to such states as undertook, in accordance with the terms of the Act, to cooperate with the United States in reducing maternal and infant mortality.

The court held that the State's right over the subject matter was not invaded since payment would and could be made to the State only with its express consent. To the argument that it was an attempt to induce the State to give up part of its sovereign rights, it was answered

that this question as between the United States and a State was a political question and not a judicial one, and that it therefore could not be decided by the court.

The court held that the individual taxpayer had no standing. The taxpayer's contention was that if the money was appropriated she might be called upon in the future to pay taxes which would not have been assessed on her if these moneys had not been so appropriated.

The court said of the taxpayer:

> "His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity. . . .
>
> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

In other words, it was not shown that the plaintiff was suffering any immediate damage nor was it certain that she would suffer any damage in the future, and the possibility that she would suffer any damage in the future was merely shared with all members of the public and she showed no specific or special damage to herself.

Of course, the present case is quite different. Here the Hoosac Mills is called on to pay immediately over $80,000, which we submit is illegally assessed. It is not an indeterminate question of whether it may or may not be damaged in the future by the payment of these unlawful benefits from the Treasury, nor is the taxpayer

damaged merely as all members of the public are or may be damaged. The damage is immediate, direct, and certain and the public generally is not suffering this damage, but only the Hoosac Mills and a few other cotton textile manufacturers. The *Mellon* case clearly has no application.

Respectfully Submitted,

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FILE COPY

IN THE

Supreme Court of the United States

October Term, 1935.

No. 40

UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM M. BUTLER, *et al., Receivers of Hoosac Mills Corporation.*

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OTHER AUTHORITIES CITED

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2 Corpus Juris 473, §90	3
Handbook of Official Grain Standards of the United States (1934) U.S.G.S.A.	9
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Yearbook of Agriculture, 1935, pp. 8, 42	6, 7
Agricultural Exports of the United States, 1934-35, Foreign Crops & Markets, Vol. 31, p. 605	32
The Agricultural Outlook for 1935-36: The Cotton Outlook for 1936, pp. 6-7, Nov. 4, 1935 (U. S. Dept. of Agriculture)	36
American Tobacco Types, Uses & Markets (U. S. Dept. of Agriculture), Circular No. 249, p. 83	14, 15, 18, 19

OTHER AUTHORITIES CITED (*Continued*)

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Foreign Trade of the United States—Calendar Year 1934, pp. 19, 20 (U. S. Dept. of Agriculture) 34

Monthly Summary of Foreign Commerce of the United States, September 1931; June, July and August, 1932; September 1933; September 1934; September 1935 33

Regional Problems in Agricultural Adjustment, pp. 54-55, (U. S. Dept. of Agriculture) 9, 34

Report on Acreage, Production, Carry-Over, Supply and Consumption of Cotton, Tables 3 and 7 (U. S. Dept. of Agriculture) 37

Special Wheat Review, March 14, 1935 (U. S. Dept. of Agriculture) 35

World Wheat Prospects, October 29, 1935, p. 4 (U. S. Dept. of Agriculture) 35

CASES CITED

Bordens Co. v. United States, 293 U. S. 194; 55 S. Ct. 187 2

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IN THE

Supreme Court of the United States

October Term, 1935.

No. 401

UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM M. BUTLER, *et al., Receivers of Hoosac Mills Corporation.*

BRIEF AMICI CURIAE

INTRODUCTORY.

The purpose of this brief is two-fold:

A. To demonstrate the extent to which Congress, in the Agricultural Adjustment Act, delegated its powers to the Secretary of Agriculture by showing the powers exercised and the *manner* in which they were exercised.

B. To question the argument advanced in the Government's brief (pp. 179 et seq.) that the Agricultural Adjustment Act was "soundly" designed to promote the general welfare.

A.

THE POWERS DELEGATED.

The Government, in its brief, argues that the Agricultural Adjustment Act is "not invalid because of improper

delegation of legislative power." The brief is replete with expressions to the effect that the imposition, adjustment, and termination of the processing taxes "is defined with detailed exactness by Congress" and "requires the simplest of mathematical computations from figures designated by Congress."[1] Believing that upon this question "a page of history is worth a volume of logic,"[2] it is our purpose to show that Congress delegated the power to the Secretary of Agriculture to decide *whether to tax any commodity, when to tax it, at what rate, and for how long.*

It is submitted that in determining the grave constitutional questions in this case, the Court should not be narrowly confined to an examination of the powers exercised in placing a tax on the processing of cotton.[3] The validity of the Act of Congress must be judged by the powers delegated. Their scope can be demonstrated in this instance by examination of the actions of the Secretary in connection with all the basic agricultural commodities.[4]

The taxes here involved all accrued prior to the amendments of August, 1935. Our discussion is, therefore, confined to the Act as it existed before such amendments.[5]

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[1] Brief for the Government, pp. 49, 50. See also pp. 53, 55, 56, 59, 61, 64, 66, 71, 72, 73, 77, 106.

[2] Mr. Justice Holmes in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349.

[3] The Government in its brief (p. 65, note 25) refers to commodities other than cotton in support of its arguments.

[4] *Bordens Co.* v. *Baldwin*, 293 U. S. 194.

[5] It is not the purpose of this brief to discuss the extent or effect of the recent amendment to the Agricultural Adjustment Act, purporting to legalize and ratify the taxes here involved. This has already been done by briefs on file with the Court. We suggest, however, that since the Government resorts to the law of agency as a basis for supporting its argument of ratification, that law should be further examined.

An agent, in order to ratify the acts of a sub-agent, must

I. The Power Delegated to the Secretary:— To Initiate the Tax.

(a) *Statutory Provisions.*

"Sec. 9. (a) * * * *When the Secretary of Agriculture determines* that rental or benefit payments are to be made with respect to any basic agricultural commodity, *he* shall proclaim such determination, *and* a processing tax shall

---

have the power to appoint a sub-agent or the power to ratify a sub-agent's acts. (Restatement of the Law of Agency, § 93, pp. 232-234.) Conversely:

> "As a general rule, an agent cannot ratify an unauthorized act or contract performed or entered into by himself so as to make his principal liable thereon; *nor can an agent ratify an unauthorized act or contract performed or entered into by a third person on behalf of his principal.*" (Italics supplied.) 2 C. J. 473, § 90.

Congress can exercise only such authority as is delegated to it by the people of the United States. Except as it may be authorized to do so, Congress cannot delegate its legislative power to others. Under the principles of agency, Congress, acting as agent for the people of the United States, may not ratify either its own unauthorized act or an unauthorized act performed by a third party (the Secretary of Agriculture) on behalf of its principal (the people). *Ironwood Stove Co.* v. *Harrison,* 75 Mich. 197; 42 N. W. 808; *Trudo* v. *Anderson,* 10 Mich. 357, 81 Am. Dec. 795; *O'Connor* v. *Arnold,* 53 Ind. 203; *Citizens Nat. Bank of Cameron* v. *Good Roads Gravel Co.* (Tex. Civ. App.) 236 S. W. 153; *State Exchange Bank of New Boston* v. *Simms* (Tex. Civ. App.), 266 S. W. 1111; *Horrabin* v. *McCallum,* 19 Ia. 441, 182 N. W. 646; *Sturm* v. *Continental Oil Co.,* 131 Kan. 518, 292 Pac. 774; *Britt* v. *Gordon,* 132 Ia. 431, 108 N. W. 319; *Driscoll* v. *Modern Brotherhood of America,* 77 Neb. 282, 109 N. W. 158.

The cases of *United States* v. *Heinszen & Co.,* 206 U. S. 370, *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226, and *Tiaco* v. *Forbes,* 228 U. S. 549, are in accord with this legal principle, for in those cases it was, in effect, decided that Congress had the power to delegate its legislative authority when dealing

be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * *." (Italics supplied.)

(b) *Acts of Secretary thereunder.*

By proclamation the Secretary determined that rental or benefit payments were to be made with respect to the following commodities effective on the dates specified:

Basic Commodities Subject to Processing tax	Date of Proclamation	Effective date of tax
Cotton	July 14, 1933	Aug. 1, 1933
Field Corn	Oct. 12, 1933	Nov. 5, 1933
Hogs	Aug. 17, 1933	Nov. 5, 1933
Peanuts	Aug. 23, 1934	Oct. 1, 1934
Rice	Mar. 26, 1935	April 1, 1935 [6]
Sugar	May 9, 1934	June 8, 1934 [7]
Tobacco	Aug. 10, 1933 [8] Sept. 5, 1933 [9]	Oct. 1, 1933
Wheat	June 20, 1933	July 9, 1933
Rye	July 3, 1935	Sept. 1, 1935 [1]

[6] Fixed by the Amendatory Act of March 18, 1935, Public No. 20, 74th Congress. The marketing year, also prescribed in this Amendatory Act, commences August 1, 1935.

[7] Fixed by the Amendatory Act of May 9, 1934, Public No. 213, 73rd Congress. The marketing year also prescribed in this Amendatory Act is the calendar year.

[8] Cigar leaf tobacco.

[9] Maryland, Burley, flue-cured, fire-cured, dark air-cured tobacco.

[1] Rye was added to the list of basic agricultural commodities

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with the possessions of the United States. They also emphasize the rule that where Congress does not have the power to delegate its authority it cannot ratify the acts of the sub-agent. No other interpretation can properly be given the language of the *Heinszen & Co.* case, supra, where the Court said:

> "Congress possessed the power to have authorized their imposition *in the mode in which they were enforced.*" (Italics supplied.)

The Secretary has also determined that the following commodities compete with basic agricultural commodities and are, therefore, subject to a compensating tax:

Competing Commodities Subject to Processing Tax	Date of Proclamation	Effective date of Tax
Jute	Dec. 1, 1933	Dec. 1, 1933
Paper	Dec. 1, 1933	Dec. 1, 1933
Paper tape	Nov. 1, 1935	Nov. 1, 1935

The Secretary has issued no proclamation respecting the following commodities, described in the Act as basic agricultural commodities: flax, barley, grain sorghums, cattle, milk and its products, and potatoes. However, the parity price and the average farm price of each of the above commodities, as shown by the statistics first available after the date on which the commodity was first named in the Act, were as follows: [2]

Date of Act	Basic Commodity	Date of First Available Statistics	Parity Price	Average Farm Price
4/ 7/34	Flax (per bu.) ¢	6/15/34	206.3	167.8
4/ 7/34	Barley (per bu.) ¢	6/15/34	75.5	50.9
4/ 7/34	Grain sorghums	No data	No data	No data
4/ 7/34	Cattle (per 100 lb.) $	6/15/34	6.36	4.00
5/12/33	Milk and its products (wholesale per 100 lb.) $	6/15/33	1.84	1.21
8/24/35	Potatoes (per bushel) ¢	9/15/35	48.4	89.0

[2] The proof in this suit shows the formula adopted by the Secre-

by the Amendatory Act of April 7, 1934. (Public No. 142, 73rd Congress), but no tax was imposed thereunder until one year later. The available statistical data of June 15, 1934 (the data the Secretary would have used to impose a tax on September 1, 1934), shows a parity price for rye of 87.8¢ per bushel, and an average farm price of 58.2¢ per bushel. What standard is in the Act to determine that the tax should not be imposed for the 1934 marketing year but should be imposed for the 1935 marketing year?

By the statute, Congress did not levy the tax but authorized the Secretary to levy or refrain from levying it. He has exercised that power by taxing some commodities while not taxing others which were selling below parity.

Not only is this situation true with respect to basic agricultural commodities, but also with respect to competing commodities. Certain paper and jute products have been taxed as competing with cotton. However, wool, rayon, linen, and silk remained untaxed, although every housewife commonly accepts them as competing with cotton. The same relationship exists between hogs, cattle and sheep, although only hogs have been taxed.

The Government argues (Brief, pp. 71-84) that the Secretary is given no discretion as to imposing a processing tax, because once he finds that a reduction of domestic production will result in a raising of farm prices action by him is mandatory. This, the Government argues, "requires simply the use of facts currently collected by official agencies and the use of analyses and forecasts as to the price, supply and demand outlook made with routine regularity by the Department since 1923."[3]

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[3] "The administration obtained the support of large majorities before putting into effect any of the acreage adjustments or marketing agreements; *when farm opinion failed to unite on a proposed dairy program, the administration withdrew it.*" Yearbook of Agriculture, 1935, U. S. Department of Agriculture, p. 8. (Italics supplied.)

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tary in determining the parity price, the average current farm price, and the difference. We have used the same formula in our computations above. In the case of milk, named in the original act, we have used data from the data sheet introduced in evidence in this case. In the case of other commodities (added by amendment of the act) the data employed is that set out in similar data sheets issued by the Department of Agriculture for subsequent months.

Any action by the Secretary, however, is admittedly made dependent on domestic supplies, world supplies and producer sentiment. (Brief, pp. 72-76.) Obviously, the Government should have added to this list of factors involved such items as drought, flood, insects, plant diseases, war, purchasing power, monetary policy, and dozens of other items.[4] Patently, Congress set up no standards for the Secretary to follow, but gave him unlimited power of discretion in determining whether or not a tax should be imposed.

"That Congress cannot delegate legislative power to the President is universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Panama Refining Co.* v. *Ryan*, 55 S. Ct. 241. Can there be any doubt that the power to tax ("the power to destroy"[5]) is a Legislative power?[6]

The taxing power is so vital, so potentially destructive, so forceful, that it should be exercised only by Congress. One cannot plead that his property is taken for a public use without compensation if it is taken by the process of a proper tax.[7] Consequently, the courts should apply

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[4] "Unfortunately, weather conditions in both hemispheres upset all calculations last year, and to a still greater extent this year." Yearbook of Agriculture, 1935, U. S. Department of Agriculture, p. 42.

[5] *McCulloch* v. *Maryland*, 4 Wheat. 316.

[6] The power to tax was regarded as of such great importance that the Constitution provided that all bills for raising revenue should originate in the House of Representatives—the body elected by the people—rather than in the Senate, whose members were then chosen by the State legislatures.

[7] *Magnano* v. *Hamilton*, 292 U. S. 40:

> "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by

more strictly the rule against delegation of legislative power when applying it to taxation than when dealing with other powers vested in Congress, which are subject to the Fifth Amendment.

II. The Power Delegated to the Secretary:—
To Determine the Commodity Taxed.

(a) *Statutory Provisions.*

"Sec. 11. As used in this title, the term 'basic agricultural commodity' means wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, tobacco, sugar beets and sugarcane, peanuts, and milk and its products, and any regional or market classification, type, or grade thereof; * * *."

(b) *Acts of Secretary thereunder.*

The Act specifies the basic agricultural commodities and provides for "any regional or market classification, type, or grade thereof". The Secretary provided for eight different market classifications of tobacco and subdivided each market classification into types or grades. The result is that there are thirty-six tax rates applicable to the processing of tobacco.[8]

Proceeding under the same Act, the Secretary imposed only one rate of tax for cotton and only one for wheat.

[8] T. D. 4530—March 8, 1935. In addition, special rates are fixed for special uses of the various classifications and grades.

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the Constitution * * *. That clause is applicable to a taxing statute such as the one here assailed only if the Act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property."

In the case of cotton, the rate is 4.2 cents per pound, regardless of market classifications, types or grades thereof. The fact is that there are *481* market classifications, types or grades of cotton.[9] On April 23, 1934, the prices of these grades of cotton ranged from 9.15 cents per pound to 18.70 cents per pound.[9] It is immediately apparent that a tax rate of 4.2 cents per pound cannot apply with equal propriety to all types of cotton.[1]

A similar situation exists with respect to wheat. The Secretary has imposed a tax rate of 30 cents per bushel of 60 pounds. Such procedure overlooks the fact that there are at least *sixteen* classifications of wheat and in addition thereto there are numerous special sub-classifications and grades.[2]

The Government argued in the lower court that the *six* market classifications of tobacco are essentially different commodities, whereas the various grades of cotton are essentially only one commodity. This argument inherently establishes an unconstitutional delegation of powers. Where in the Act is there any standard to advise the Secretary

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[9] House Document 405, 73rd Congress, 2nd Session, p. 4 "Cotton Classing and Market News Service for Farmers."

[1] See discussion of Act on floor of the Senate by Senator Smith (Chairman of Committee on Agriculture and Forestry), where he explained that different rates of tax would be applied to the various staple lengths of cotton. Cong. Rec., Vol. 77, Part 2, p. 1389.

[2] Handbook of Official Grain Standards of the U. S., published by the Department of Agriculture (1934), U. S. G. S. A. Form No. 90; Amended March 28, 1935:

> "Although wheat is often considered as a homogeneous commodity, it is in fact comprised of at least five distinct classes." *Regional Problems in Agricultural Adjustment*, U. S. Department of Agriculture, Agricultural Adjustment Administration, March, 1935, p. 54.

of Agriculture when he should subdivide a basic commodity into grades or types or when he should classify them together and subject them to one rate of tax?

This is only one of several illustrations of the powers delegated to the Secretary; powers which greatly exceed the mere determination of facts or the "filling up of details."[3]

Further illustrating the power of the Secretary of Agriculture to determine the commodity taxed, we again refer to "cotton". At no place in the Act is there any reference to "lint cotton" or "cottonseed". One would suppose that, in using the term "cotton", Congress referred to the farm product which is later separated by ginning into "lint cotton" and "cottonseed". Especially does this become true when the stated purpose of the Act is considered, i.e., to reestablish farm purchasing power. The Department of Agriculture's statistics show that in October, 1935, "lint cotton" was selling for 70% of parity (new basis), whereas during the same month "cottonseed" was selling at 115% of parity (new basis).[4] The Secretary assumes that the Act authorizes him to tax "lint cotton" although the purpose of the Act is to raise the farm purchasing power of the cotton grower to parity.[5] Conceivably, parity might

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[3] Chief Justice Marshall in *Wagman* v. *Southard*, 10 Wheat., 1, 43.

[4] 1400 lbs. of farm cotton will average 500 lbs. of lint cotton and 900 lbs. of cottonseed.

[5] Section 2 of the Act as originally enacted declared the policy to be to re-establish farm prices "at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period * * *." The phrase "parity price" has been generally adopted as describing this desired level. No method of determining this level was outlined in the statute, except that the Secretary was to use statistics available in the Department of Agriculture. Perhaps Congress

be reached for "cotton" because of increased prices for cottonseed, while "lint cotton" remained below parity.

Nowhere in the Act is the standard given under which the Secretary of Agriculture distinguishes between "lint cotton" and "cottonseed", both products of the cotton plant.[6]

III. The Power Delegated to the Secretary:— To Fix the Tax Rate.

(a) *Statutory Provisions.*

Section 9 (a) provides in part:

"* * * The rate of tax shall conform to the requirements of subsection (b). Such rate shall be deter-

[6] In the case of cotton, no allowance is made by the Secretary for the dirt content of the cotton. In effect, the processors are paying 4.2 cents processing tax on the dirt in a bale of cotton. With respect to peanuts, however, an allowance is made for dirt so that a processing tax is not paid on this foreign matter. [T. D. 4489, October 26, 1934.] With respect to cigar leaf tobacco, we are advised by the Bureau of Internal Revenue that 7 per cent adjustment in weight is allowed to the processor on account of the moisture content, but no similar allowance is made for the moisture content of cotton. See also the proclamation of the Secretary of Agriculture dated February 1, 1934, adjusting the tax rate with respect to field corn to a 15½% moisture basis.

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was not satisfied with the manner in which the Secretary arrived at parity prices; in any event, in the amendments of August 24, 1935, it added to the language quoted above, "and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period."

mined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements * * *."

Section 9 (b) provides in part:

"The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; * * *."

Section 9 (c) provides:

"For the purposes of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

(b) *Acts of Secretary thereunder.*

(1) *In fixing original rate of tax*

It is contended by the United States that the computation of the tax rate involves the exercise of no discretion by the Secretary but only the use of "the simplest of mathematical computations".[7] Examination of the facts, however, shows that this is erroneous, and that Congress did not in the Act lay down sufficient standards or formulae to permit the tax rate to be determined without the use of almost unlimited discretion by the Secretary.

In his proclamations the Secretary fixed the rate of tax and the effective dates. These proclamations were issued in advance of the effective dates of the several taxes. The statistical data on which the rates were based was in-

[7] Brief, p. 50.

variably as of some date *prior* to the proclamation, varying from three weeks to thirteen months. Since price changes were constantly taking place, the rate of tax for any commodity depended, among other things, upon the date which the Secretary selected for his proclamation and the periods covered by the statistical data selected by him. The following table graphically illustrates the discretion exercised by the Secretary in thus fixing the tax rates:

Commodity	Effective Date of Tax	Date of Proclamation	Computations of Secretary: Date of statistical data used	Rate Fixed	Rate of tax computed upon data as of the effective date [8]
COTTON (¢ per lb.)	Aug. 1, 1933	July 14, 1933	June 15, 1933	4.2	4.1
WHEAT (¢ per bushel)	July 9, 1933	June 20, 1933	June 15, 1933	30.	12.6
CORN (¢ per bushel)	Nov. 5, 1933	Oct. 21, 1933	Sept. 15, 1933	5.0[9]	34.9
HOGS [1] ($ per cwt.)	Nov. 5, 1933	Oct. 18, 1933	Sept. 15, 1933	.50[2]	4.57
	Dec. 1, 1933	Oct. 18, 1933	Sept. 15, 1933	1.00[2]	5.18
	Jan. 1, 1934	Oct. 18, 1933	Sept. 15, 1933	1.50[2]	5.39
	Feb. 1, 1934	Oct. 18, 1933	Sept. 15, 1933	2.00[2]	4.98
PEANUTS (¢ per lb.)	Oct. 1, 1934	Sept. 24, 1934	not known	1.00[9]	2.7
TOBACCO (¢ per lb.)	Oct. 1, 1933	Sept. 14, 1933			
Cigar leaf			Dec. 1932—Apr. 1933	3.0[9]	note [3]
Maryland			Sept. 1932—Aug. 1933	1.7	1.5
Burley			Dec. 1932—Apr. 1933	2.0	note [3]
Flue-cured			Aug. 1932—Mar. 1933	4.2	5.2
Fire-cured			Nov. 1932—May 1933	2.9	note [3]
Air-cured			Dec. 1932—April 1933	3.3	note [3]

[8] In these computations, the theory expounded by the United States in this case for the computation of the tax has been used.

[9] The rate fixed was stated to be less than parity upon ground that tax at parity would result in accumulations of surplus stocks.

[1] On December 21, 1933, the Secretary amended his regulations to provide that effective January 1, 1934 the rate would be $1.50 per hundred weight; effective March 1, 1934, the rate should be $2.25 per hundred weight.

[2] A progressive scale of tax was fixed. The scale has been changed several times. See Hog Regulations, Series 1; Series 1, Supplement 1; Series 1, Revision 1; Series 1, Supplement 2; Series 1, Supplement 3; Series 1, Number 1; Treasury Decision 4406; Treasury Decision 4425; Treasury Decision 4518.

[3] No data available as of effective date. In selecting a marketing year beginning October 1, the Secretary appears to have acted arbitrarily. See "American Tobacco Types, Uses and Markets," U. S. Dept. Agri. Circular, No. 249, p. 83.

The Court will note from the following:

(a) That due to the substantial increase in the farm price of wheat between June 15, 1933 (the date of the statistical data) and July 9, 1933; (the effective date of the tax) the rate of tax exceeded the difference between parity and average farm price on the effective date by more than 100 per cent.

(b) That in some instances data as of a particular date was used, while in other instances data covering a period of time was used. In the case of tobacco (except Maryland tobacco), the marketing period consists of only a few months and during the balance of the year there is no farmers' market.[4] In computing the tax rate on types of tobacco, the Secretary did not use the farm price as of a particular date, as was done with other commodities, but instead used the price over a period of time. In the case of Maryland tobacco, farm prices for the year, September, 1932, through August, 1933, were used to fix a tax effective October 1, 1933, while in the case of flue-cured tobacco, farm prices for the period from August, 1932, through March, 1933, were used to fix a tax effective October 1, 1933. In other words, the current market was disregarded and sales of a previous year used.

(2) *In determining the marketing year*

The discussion above illustrates the power of the Secretary of Agriculture to fix the original rates of tax. His power to determine the marketing year should also be considered, for obviously the fixing of the marketing year affects the statistical data used to determine the tax rates.

The Government in its brief states: (p. 64)

"It cannot seriously be contended that the Secretary

[4] "American Tobacco Types, Uses and Markets," U. S. Dept. of Agriculture, Circular No. 249, p. 83.

of Agriculture may initiate a processing tax upon any particular day in the year which he may choose."

Our reply, however, is that the Secretary has used the power to ascertain and prescribe the marketing year of various commodities in such a manner as to initiate the tax upon such days as he chose.

The Government's brief states that "each particular commodity has a well-defined annual period within which its marketing takes place." (p. 64) As authority, it cites the Yearbook of Agriculture, 1932, of the United States Department of Agriculture. A comparison of marketing years proclaimed by the Secretary, with those disclosed by this authority shows the following:

"MARKETING" YEARS OF BASIC AGRICULTURAL COMMODITIES

Commodity	Marketing Year under AAA	Yearbook of Agriculture for 1932		"Other" Reference Years"	Pages
		Crop Year	Marketing Year		
Cotton	Aug. 1	Aug. 1		Aug. 1	658–670
Field Corn	Nov. 5	Oct. 1		Nov. 1	615–619
Hogs	Nov. 5			Oct. 1	788–789
Peanuts	Oct. 1	Nov. 1		Sept. 1	763–765
Rice [5]	April 1	.....	.....	.....	
Sugar [6]	Jan. 1	.....	.....	.....	
Tobacco	Oct. 1			Dec. 1	690
Cigar leaf				Oct. 1	692
Maryland				Oct. 1	691
Burley				Oct. 1	691
Flue cured				July 1	691, 694
Fire cured				Oct. 1	690
Dark air cured				Oct. 1	691
Wheat	July 9	July 1		July 1	587–598
Rye	Sept. 1	July 1			606–607
Flax		July 1 Sept. 1			641–646
Barley		Aug. 1		July 1	636–639
Grain Sorghums		Nov. 1			657
Cattle				Jan. 1	775–783
Milk & its products				Jan. 1	829–844
Potatoes [7]	Dec. 1	.....	.....	.....	

[5] Fixed by Amendatory Act March 18, 1935, Public Laws No. 20, 74th Congress.

[6] Fixed by Amendatory Act May 9, 1934, Public Laws No. 213, 73rd Congress.

[7] Fixed by Amendatory Act Aug. 24, 1935, Public Laws No. 320, 74th Congress.

The Court will note from the foregoing:

(1) The Yearbook of Agriculture does not mention "marketing years" for any basic agricultural commodities. The citation of that book as authority (Government brief, p. 65) can only mean that the Secretary of Agriculture has decided that "crop year" and "marketing year" are synonymous.[8] If Congress had desired to use the "crop year" as the basic date for the imposition of the processing tax they could have used that term in the statute. The fact that the Secretary resorts to the "crop year" as a synonym for "marketing year" clearly establishes that there was not a sufficient standard used in the Act to guide him. Of necessity the Secretary has determined so-called "marketing years" according to the dictates of his own reasoning.

(2) Even the argument that Congress intended that "crop year" and "marketing year" be synonomous must fail, for the above chart discloses the following:[9]

Wheat:

Year per Yearbook, July 1 (pp. 587, et seq).
Year per Secretary, July 9.

Field Corn:

Year per Yearbook, October 1 (Table 52).
November 1 (Tables 53 and 56) (pp. 615, 616).
Year per Secretary, November 5.

Hogs:

Year per Yearbook, October 1 (p. 788).
Year per Secretary, November 5.

Rye:

Year per Yearbook, July 1 (pp. 605-606).
Year per Secretary, September 1.

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[8] Patently "crop year" and "marketing year" are not synonomous in the case of tobacco. The tobacco must be dried before it is marketed. Cf. year dates shown for tobacco in the above chart with the "marketing year" data shown in "American Tobacco Types, Uses and Markets," p. 83.

[9] In the case of tobacco, the Secretary "ascertained and pre-

It is submitted that the actions of the Secretary of Agriculture are consistent only with an interpretation of the statute which gives him discretionary power to fix the marketing year and are inconsistent with the interpretation urged in the Government's brief that "the beginning of the marketing year" for each commodity is *an established date* and that the sole duty of the Secretary was to ascertain that date from available data in the Department of Agriculture.

(3) *In adjusting rate of tax.*

The Act provides that the Secretary shall adjust the rate of tax at such times as he finds necessary to effect the declared policy; a blanket discretion vested in him without any limitations other than his own judgment as to necessity.

Without making any findings of fact, the Secretary issued a proclamation on September 27, 1934, which provided that as of October 1, 1934 the tax on Maryland and Burley tobacco should be changed to reflect the difference, at that time, between the parity price and the average farm price. In other words, in the case of these

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scribed" the marketing year for all types as beginning October 1. In "American Tobacco Types, Uses and Markets," published by the Department of Agriculture, the marketing period for the various types is given as beginning on the dates following (p. 83):

Type	*Date*
Cigar Leaf	
Maryland	July
Burley	December
Flue-cured	August
Fire-cured	November
Air-cured	November

two types of tobacco, the Secretary adjusted the tax at the end of the first marketing year to reflect the changes which had taken place in the price structure. However, he made no such change in any other type of tobacco or in any other basic commodity, although, as shown in the following table, such changes would have been justified.

(1)	(2)	(3)	(4)	(5)
Commodity	Date of Beginning of New Marketing Year	Rate of Tax Computed Upon Data as of this Date	Actual Rate of Tax as of this date	Difference (3) from (4)
Cotton (¢ per pound)	8/1/34	2.7	4.2	+1.5
Corn (¢ per pound)	11/5/34	4.9	5.0	+ .1
Hogs ($ per cwt.)	11/5/34	4.00	2.25	−1.75
Wheat (¢ per bushel)	7/9/34	29.0	30.0	+1.0
Tobacco (flue-cured) (¢ per pound)	10/1/34	0.	4.2	+4.2

The most startling fact is that in the same proclamation in which the Secretary redetermined the tax rate upon Maryland and Burley tobacco, he continued the old rate upon flue-cured tobacco, although the current farm price exceeded parity.

While the Secretary adjusted tobacco rates at the end of the first marketing year, and made no such adjustment in the case of other commodities, there is no standard or formula other than his own judgment which prescribes how often the changes are to be made. We list below the difference between parity and average farm price of cotton as compiled by the Secretary at various dates and the tax rate continued in force by him:

	(1) Parity Price	(2) Average farm Price	(3) Difference between parity and average farm price[1]	(4) Rate of Tax Imposed	(5) Difference (3) from (4)
Aug. 1, 1933	13.6	9.7	3.9	4.2	+0.3
Aug. 15, 1933	13.9	8.8	5.1	4.2	−0.9
Sept. 15, 1933	14.4	8.8	5.6	4.2	−1.4
Oct. 15, 1933	14.4	9.0	5.4	4.2	−1.2
Nov. 15, 1933	14.4	9.6	4.8	4.2	−0.6
Dec. 15, 1933	14.4	9.6	4.8	4.2	−0.6
Jan. 15, 1934	14.5	10.3	4.2	4.2	0
Feb. 15, 1934	14.8	11.7	3.1	4.2	+1.1
Mar. 15, 1934	14.9	11.7	3.2	4.2	+1.0
April 15, 1934	14.9	11.6	3.3	4.2	+0.9
May 15, 1934	15.0	11.0	4.0	4.2	+0.2
June 15, 1934	15.0	11.6	3.4	4.2	+0.8
July 15, 1934	15.1	12.3	2.8	4.2	+1.4
Aug. 1, 1934	15.3	12.7	2.6	4.2	+1.6
Aug. 15, 1934	15.5	13.1	2.4	4.2	+1.8
Sept. 15, 1934	15.6	13.1	2.5	4.2	+1.7
Oct. 15, 1934	15.6	12.5	3.1	4.2	+1.1
Nov. 15, 1934	15.6	12.3	3.3	4.2	+0.9
Dec. 15, 1934	15.6	12.4	3.2	4.2	+1.0

(4) *In reducing rate of tax to prevent accumulations.*

The Secretary is given the power to adjust the tax to prevent accumulation of surplus stocks or depression of the farm price. No other criterion is supplied to guide the Secretary in determining when and to what extent the tax shall be reduced. This power has been exercised by the Secretary to reduce the tax upon corn, hogs, peanuts and certain classifications and uses of tobacco, below a rate which represents the difference between parity and current average farm price of the commodity.

The chart set forth below shows the various actions taken by the Secretary with respect to tobacco; only one of the basic commodities named in the Act.

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[1] Adjustment for tare would increase this difference by from one-tenth to two-tenths of a cent.

Market Classification	10/1/33	8/1/34	10/1/34	2/1/35	10/1/35[3]
Cigar leaf, all kinds					
farm sales weight	3.00[2]	....	....	....	....
sweated, unstemmed	3.75[2]	....	....	....	....
sweated, stemmed	5.00[2]	....	....	....	....
Cigar leaf, No. 118 Fire-cured					
farm sales weight	....	....	....	3.00[2]	3.00[2]
sweated, unstemmed	....	....	....	3.25[2]	3.25[2]
sweated, stemmed	....	....	....	4.30[2]	4.30[2]
Cigar leaf, used in scrap chewing or smoking					
farm sales weight	....	....	....	2.00[2]	2.00[2]
sweated, unstemmed	....	....	....	2.50[2]	2.50[2]
sweated, stemmed	....	....	....	3.30[2]	3.30[2]
Cigar leaf, all others					
farm sales weight	....	....	....	3.00[2]	3.00[2]
sweated, unstemmed	....	....	....	3.75[2]	3.75[2]
sweated, stemmed	....	....	....	5.00[2]	5.00[2]

[2] Proclamation states that tax is fixed at a rate which will prevent the accumulation of surplus stocks and depression of the farm price.

[3] The proclamation of September 26, 1935, effective October 1, 1935, purports to give effect to the amendments of August 24, 1935, permitting a tax although the commodity has reached or exceeded its parity price.

Market Classification	10/1/33	8/1/34	10/1/34	2/1/35	10/1 35[5]
Maryland					
farm sales weight	1.70	....	0.00[6]	....	3.62
sweated, unstemmed	1.80	....	0.00	....	3.85
sweated, stemmed	2.40	....	0.00	....	5.20
Burley					
farm sales weight	2.00	....	6.10[6]	....	3.50
sweated, unstemmed	2.30	....	7.00	....	4.00
sweated, stemmed	3.10	....	9.50	....	5.40
Burley, used in manufacture of plug chewing tobacco and twist					
farm sales weight	....	....	4.10[4]	....	....
sweated, unstemmed	....	....	4.70[4]	....	....
sweated, stemmed	....	....	6.40[4]	....	....
Burley, used in manufacture of chewing tobacco					
farm sales weight	....	....	....	2.50[4]	2.50[4]
sweated, unstemmed	....	....	....	2.90[4]	2.90[4]
sweated, stemmed	....	....	....	3.90[4]	3.90[4]

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[4] Proclamation states that tax is fixed at a rate which will prevent the accumulation of surplus stocks and depression of the farm price.

[5] The proclamation of September 26, 1935, effective October 1, 1935, purports to give effect to the amendments of August 24, 1935, permitting a tax, although the commodity has reached or exceeded its parity price.

[6] In the case of Maryland and Burley tobacco, the Secretary on September 27, 1934, redetermined the difference between parity and average farm prices, as of October 1, 1934, and fixed new rates of tax. In the case of other classifications, there was no rede-

Market Classification	10/1/33	8/1/34	10/1/34	2/1/35	10/1/35[8]
Flue cured					
farm sales weight	4.20	....	(note 8)	....	1.89
sweated, unstemmed	4.70	....	....	....	2.13
sweated, stemmed	6.10	....	....	....	2.73
Flue cured, manufactured into plug chewing tobacco and twist					
farm sales weight	....	3.30[7]	....	....	....
sweated, unstemmed	....	3.70[7]	....	....	....
sweated, stemmed	....	4.80[7]	....	....	....
Flue cured, manufactured into chewing tobacco					
farm sales weight	....	....	....	2.00[7]	....
sweated, unstemmed	....	....	....	2.30[7]	....
sweated, stemmed	....	....	....	2.90[7]	....
Fire cured					
farm sales weight	2.9	....	(note 9)	....	2.14
sweated, unstemmed	3.2	....	....	....	2.36
sweated, stemmed	4.1	....	....	....	3.10
Fire cured, manufactured into chewing tobacco[1]		....	....	2.00	....
farm sales weight	....	....	....	2.00[7]	....
sweated, unstemmed	....	....	....	2.20[7]	....
sweated, stemmed	....	....	....	2.90[7]	....

[7] Proclamation states that tax is fixed at a rate which will prevent the accumulation of surplus stocks and depression of the farm price.

[8] The proclamation of September 26, 1935, effective October 1, 1935, purports to give effect to the amendments of August 24, 1935, permitting a tax, although the commodity has reached or exceeded its parity price.

termination of such difference or adjustment of the rate. Available data for flue cured tobacco, as of October 1, 1934, showed the average farm price to be in excess of parity.

Market Classification	10/1/33	8/1/34	10/1/34	2/1/35	10/1/35
Dark air cured					
farm sales weight	3.30	....	(note 9)	....	....
sweated, unstemmed	3.80	....	....	....	....
sweated, stemmed	5.10	....	....	....	....
Dark air cured, manufactured into chewing tobacco					
farm sales weight	....	....	....	2.00	....
sweated, unstemmed	....	....	....	2.30	....
sweated, stemmed	....	....	....	3.10	....

As shown in this chart, the Secretary fixed the rate of tax on certain types at the full rate and on other types at a reduced rate; he fixed different rates for different uses of the same type; he redetermined the rate as of October 1, 1934, upon certain types and continued the old rate upon other types.[2] By the device[3] of continuing in

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[9] In the case of Maryland and Burley tobacco, the Secretary on September 27, 1934, redetermined the difference between parity and average farm prices as of October 1, 1934, and fixed new rates of tax. In the case of other classifications, there was no redetermination of such difference or adjustment of the rate. Available data for flue cured tobacco, as of October 1, 1934, showed the average farm price to be in excess of parity.

[1] The difference between parity and current average farm price as of February 1, 1935 (January sales) was twenty-six one-hundredths (.0026) of a cent per pound.

[2] The current farm price of flue-cured tobacco as of October 1, 1934 (based on total September sales) exceeded parity, and a redetermination of the tax rate on the basis of the current farm price would have eliminated the tax. Yet the tax was continued on that type, and reduced on others by the use of a proclamation which provided only for the reductions. Under the Act, the Secretary may (1) continue the rate by inaction, even though parity has been reached; (2) redetermine the rate at any time; (3) reduce either the continued or redetermined rate; or (4) terminate the tax. By proper selection he may adjust the

[3] Tobacco regulations, Series 1, Number 2, dated January 18, 1935, and approved January 19, 1935.

effect an *October, 1933* rate upon fire-cured tobacco and then reducing that rate, as of *February 1, 1935* to prevent accumulation of surplus stocks or depression of farm prices, the Secretary effectively imposed a rate of tax which could not have been justified by a redetermination of the tax rate as of February 1, 1935. In brief, the Secretary enacted his own tax legislation.

IV. The Power Delegated to the Secretary:— To Terminate the Tax.

(a) *Statutory Provisions.*

"Sec. 11. * * * the Secretary of Agriculture shall exclude from the operation of the provisions of this title, during any period, any such commodity or classification, type, or grade thereof if he finds, upon investigation at any time and after due notice and opportunity for hearing to interested parties, that the conditions of production, marketing, and consumption are such that during such period this title can not be effectively administered to the end of effectuating the declared policy with respect to such commodity or classification, type, or grade thereof."

"Sec. 13. This title shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President

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rate to suit his ideas of the economics involved. For example, on October 1, 1934, he redetermined the rate on certain types of tobacco. Had he redetermined the rate on flue-cured tobacco, the tax would have been removed. So he made no redetermination with respect to that type and continued the old rate. For another type he continued the old rate but, under his power to lower the rate to prevent accumulation, fixed the tax at a rate higher than would have been justified if the rate were redetermined.

shall by proclamation terminate with respect to any basic agricultural commodity such provisions of this title as he finds are not requisite to carrying out the declared policy with respect to such commodity."

(b) *Acts of Secretary thereunder.*

The floor stock tax on peanuts was terminated by the President of the United States by a proclamation dated September 25, 1934, although the processing tax continued. The President acted pursuant to Section 13 of the Act, but failed to make any findings of fact to substantiate his decision.

A similar situation exists with respect to the processing of peanuts into peanut oil. On September 24, 1934, the Secretary of Agriculture, acting pursuant to Section 15 (a) of the Act, suspended the imposition of this tax. No findings of fact were made to substantiate his decision.

It is thus apparent that the administrative officers can terminate, or continue, lower or raise the processing and floor stock taxes on various commodities at will. The facts demonstrate that the administrative officials do not in fact act pursuant to any standards or formulae—for the reason that no adequate standards are contained in the statute.

V. The Power Delegated to the Secretary:— To Expend the Proceeds of the Tax.

(a) *Statutory provision:*

"*Sec. 12* (a). There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of

this title. Such sum shall remain available until expended.

"To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions and production adjustments with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(b) In adition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. The Secretary of Agriculture and the Secretary of the Treasury shall jointly estimate from time to time the amounts, in addition to any money available under subsection (a), currently required for such purposes; and the Secretary of the Treasury shall, out of any money in the Treasury not otherwise appropriated, advance to the Secretary of Agriculture the amounts so estimated. The amount of any such advance shall be deducted from such tax proceeds as shall subsequently become available under this subsection.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out

of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(b) *Acts of Secretary thereunder*

The Act appropriates all of the amounts collected from processing taxes for rental and benefit payments to producers. Substantially all taxes collected, and other large appropriations from other sources, have been distributed to owners of farms (both absentee-landlord and dirt-farmer) to promote the "Economy of Scarcity" thesis of the present Administration.

The Government argues in numerous parts of its brief that the taxes involved in this case must be considered distinct and apart from the question of the appropriation and expenditure of the monies so exacted (pp. 90-100, 122-135). If the theory advanced by the Government is sound, it is immediately apparent that there are no Constitutional limitations on the power of the federal government. The National Recovery Act can be made constitutional merely by placing an excise tax on all business and then making benefit payments (equal to the amount of the tax) to those businesses which sign contracts as to minimum hours and wages. The same system could be used effectively to enforce the Railway Pension Act. The federal government would soon be insidiously creeping into every form of private business and into all local matters. The logical effect of the exercise of such power is that set out in the annual report of the Secretary of Agriculture for 1935 (p. 7):

> "Farmers may not produce as much of certain things as otherwise they would. Men not now in farming may not enter it unconditionally. The Bankhead Law penalizes the production of cotton above a certain quantity; and the Kerr-Smith Act applies a similar principle to tobacco. Processing taxes affect

> the conditions under which cotton, wheat, tobacco, and corn and hogs may be produced. Milk agreements help existing dairymen, at the cost of a restraint upon new competition. *These are intended consequences.*'' (Italics supplied.)

To say that the Court may not look at the use to which the processing taxes are appropriated by the very Act which imposes them, is to say that this Court must look to the shadow and may not deal with the substance of the question before it.[4]

VI. Summary.

Power has been delegated to the Secretary of Agriculture to levy the tax or refrain from taxing, to determine the commodity to be taxed, to prescribe separate rates for various classifications and varying rates for different uses of the same commodity, to change the rate of tax at any time to reflect current conditions, or to continue a rate fixed under other conditions, to reduce the tax and fix the reduced rate, and to terminate the tax upon any commodity, any classification thereof or particular use thereof. In short, the legislative power of taxation has been lodged in the Secretary and has been exercised by him without limitation other than his own judgment. The Agricultural Adjustment Act clearly provides for a ''government of men, not of laws''.

The brief of counsel for the respondent shows that as a

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[4] The government's argument would support a contention that Congress could impose taxes to subsidize members of a prevailing political party.

matter of law there has been an unconstitutional delegation of the legislative power. It is intended by the present brief to demonstrate the unlimited powers which have *in fact* been delegated to the Secretary. It is impossible to examine the inconsistent and conflicting manner in which the Secretary has exercised those powers and not reach the conclusion that the Agricultural Adjustment Act presents a flagrant example of the abandonment by Congress of its lawmaking function by transferring "that function to the President or other officer or to an administrative body." *Panama Refining Co.* v. *Ryan*, and *Amazon Petroleum Corp.* v. *Ryan*, 55 S. Ct. 241.

B.

THE EFFECT OF THE ACT.

The Decline in Exports and Increase in Imports of Agricultural Commodities.

In the course of the Government's argument, the Agricultural Adjustment Act is credited with having promoted the recovery not only of agriculture but of industry as well. (pp. 217, et seq.) It is doubtful whether such an argument has any proper place in the present litigation.

If, however, the Court is to weigh the economic effects of the Act, it should seriously consider whether this legislation has not delayed ultimate recovery and resulted in permanent injury to the country.

The Court will, it is submitted, take judicial notice of the importance to the United States of its export trade. A large share of this export trade is made up of exports

of agricultural commodities.[5] Any Act which reduces this commerce, therefore, strikes at the welfare of the American people as a whole, and seriously endangers the future prosperity of the American farmer, whatever temporary benefits it may appear to give him.

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[5] This statement is borne out by the following passage from an article entitled *Agriculture Exports of the United States*, 1934-35, in the issue of "Foreign Crops and Markets" for October 28, 1935, p. 605 (Vol. 31, No. 18; published by the Foreign Agricultural Service of the bureau of Agricultural Economics of the United States Department of Agriculture):

> "In the post-war years up until 1926-27 the value of agricultural exports accounted for about 45 per cent of the total value of United States exports. At that time non-agricultural exports began to advance more rapidly than did agricultural exports and as a result agriculture's share of total export value was progressively reduced. By the beginning of the depression period in 1929-30, Agriculture accounted for only 32 per cent of all produces exported. This was the smallest share to be recorded since 1916-17, when huge increases in the export of industrial war materials caused a similar reduction in the share of total held by agricultural exports. However, as world depression deepened, exports of industrial materials from the United States declined more rapidly than did those of agricultural products, and the per cent of total exports attributable to agricultural exports grew larger from year to year until it reached 42 per cent in 1932-33. In the following year the percentage declined slightly, due largely to gradual improvement in foreign demand for industrial commodities and to continued low prices for agricultural products. In 1934-35 industrial exports continued their upward trend, *but agricultural exports fell sharply because of the reduction in supplies available for export*, and as a result agriculture's share of total exports declined to 32 per cent, re-establishing the relationship which prevailed at the beginning of the depression." (Italics supplied.)

Exports of Domestic "Basic Agricultural Commodities"[1] Subject to Processing Tax,
(9 months ending September)

	1931		1932		1933	
	Quantity	Value	Quantity	Value	Quantity	Value
Hogs (no.)	561	12,973	1,894	24,329	12,709	121,199
Pork & Products (lbs.)[2]	557,910,043	60,508,733	498,690,644	33,185,673	533,191,412	35,692,200
Corn (bu.)	1,987,921	1,503,344	3,135,557	1,283,683	3,541,115	1,704,868
Wheat (bu.)	51,023,075	33,137,512	46,778,967	28,207,554	3,294,260	1,900,310
Cotton except linters (bales)	3,582,613	193,463,391	5,856,201	226,314,547	5,709,910	250,917,444
Cotton Manufactures	.....	40,117,945	.....	28,595,833	.....	24,864,544
Tobacco (lbs.)	360,204,431	70,791,994	273,032,363	41,315,989	265,923,003	40,723,221
Peanuts (lbs.)	1,426,334	116,735	5,811,875	161,951	1,001,053	45,325
Sugar & related products	.....	5,875,150	.....	3,357,767	.....	3,083,447

[1] Rice and rye are omitted, as the imposition of processing taxes on those commodities is too recent to have had any material effect on
[2] Pork, hams, shoulders, bacon, sides and lard.
[3] "The increase in the wheat exported during 1934 was the result of sales by the North Pacific Emergency Export Association . . . Under t for the difference between prices paid for grain and the world price at which it was sold in the foreign markets. Shipments for export b the period September-December 1934, wheat exports dropped to relatively small quantities." Bureau of Foreign and Domestic Comm (published August, 1935).

Source: U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, "Monthly Summary of Foreign Commerce of t September 1932; September, 1933, 1934 and 1935, respectively.

Imports for Consumption of "Basic Agricultural Commodities"[1] Subject to Processing
(9 months ending September)

	1931[2]		1932[2]		1933	
	Quantity	Value	Quantity	Value	Quantity	Value
Hogs (no.)	76,316	6,480	23,367	2,019	5,803	430
Pork & Products (lbs.)[3]	2,561,709	814,681	4,477,489	835,850	2,385,158	503,939
Corn (bu.)	507,074	273,108	266,506	135,063	95,009	42,708
Wheat (bu.)	40,533	20,272	2,043,724	1,158,355	7,787	4,526
Cotton (lbs.)[4]	50,638,816	5,198,222	55,878,606	5,568,115	54,944,167	5,350,858
Cotton Manufactures[5]	.....	29,022,219	.....	20,197,593	.....	22,727,016
Tobacco (lbs.)[5]	48,262,167	25,095,479	45,561,906	19,106,802	48,052,066	17,822,060
Peanuts (lbs.)	9,214,392	242,734	479,593	10,053	230,679	4,332
Sugar and related products[5]	.....	104,325,982	.....	87,111,964	.....	95,905,194

[1] Rice and rye are omitted, as the imposition of processing taxes on those commodities is too recent to have had any material effect on i
[2] Imports other than for consumption (e.g. for re-export) are eliminated in order to obtain for 1931 and 1932 a basis similar to that us
[3] Pork, hams, shoulders and bacon.
[4] Includes short staple cotton, which is admitted duty free.
[5] Includes imports (duty free) from Philippines and Virgin Islands.

Source: U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, "Monthly Summary of Foreign Commerce of the Unite 1932; September 1933, 1934 and 1935, respectively.

Exports of Domestic "Basic Agricultural Commodities"[1] Subject to Processing Tax, and Derivative Products
(9 months ending September)

1931		1932		1933		1934		1935	
Quantity	Value	Quantity	Value	Quantity	Value	Quantity	Value	Quantity	Value
561	12,973	1,894	24,329	12,709	121,199	2,996	43,755	281	10,689
557,910,043	60,503,733	498,690,644	33,185,673	533,191,412	35,692,200	491,003,534	36,977,895	151,211,988	22,478,779
1,987,921	1,503,344	3,135,557	1,283,683	3,541,115	1,704,868	2,442,353	1,802,684	156,447	233,319
51,023,075	33,137,512	46,778,967	28,207,554	3,294,260	1,900,310	16,727,287[3]	10,106,996[3]	155,938	131,784
3,582,613	193,463,391	5,856,201	226,314,547	5,709,910	250,917,444	4,246,300	255,093,153	3,127,960	208,283,032
.....	40,117,945	.....	28,595,833	.....	24,864,544	.....	26,346,322	.....	22,500,640
360,204,431	70,791,994	273,032,363	41,315,989	265,923,003	40,723,221	299,813,219	72,236,381	225,981,669	73,514,514
1,426,334	116,735	5,811,875	161,951	1,001,053	45,325	553,586	36,914	171,983	19,708
.....	5,875,150	.....	3,357,767	.....	3,083,447	.....	4,577,910	.....	6,103,283

the imposition of processing taxes on those commodities is too recent to have had any material effect on exports.
, sides and lard.
xported during 1934 was the result of sales by the North Pacific Emergency Export Association . . . Under the agreement, the United States Government reimbursed the exporters ices paid for grain and the world price at which it was sold in the foreign markets. Shipments for export by the association were practically completed by August 1934, and during ber 1934, wheat exports dropped to relatively small quantities." Bureau of Foreign and Domestic Commerce, "Foreign Trade of the United States, Calendar Year 1934", p. 20

Commerce, Bureau of Foreign and Domestic Commerce, "Monthly Summary of Foreign Commerce of the United States," issues of September, 1931; June, July, August and 1933, 1934 and 1935, respectively.

Imports for Consumption of "Basic Agricultural Commodities"[1] Subject to Processing Tax, and Derivative Products
(9 months ending September)

1931[2]		1932[2]		1933		1934		1935	
Quantity	Value	Quantity	Value	Quantity	Value	Quantity	Value	Quantity	Value
76,316	6,480	23,367	2,019	5,803	430	496	45	1,629,230	146,907
2,561,709	814,681	4,477,489	835,850	2,385,158	503,939	1,060,728	338,303	6,784,530	1,308,645
507,074	273,108	266,506	135,063	95,009	42,708	816,694	435,308	34,809,120	16,990,593
40,533	20,272	2,043,724	1,158,355	7,787	4,526	3,336,188	3,406,506	13,446,009	10,166,708
50,638,816	5,198,222	55,878,606	5,568,115	54,944,167	5,350,858	55,748,111	7,328,084	36,353,324	5,150,903
.....	29,022,219	.....	20,197,593	.....	22,727,016	.....	21,801,845	.....	25,307,734
48,262,167	25,095,479	45,561,900	19,106,802	48,052,066	17,822,060	44,389,518	19,391,184	46,201,014	18,524,438
9,214,392	242,734	479,593	10,053	230,679	4,332	248,802	6,055	150,826	6,113
.....	104,325,982	.....	87,111,964	.....	95,905,194	.....	98,674,134	.....	135,858,303

the imposition of processing taxes on those commodities is too recent to have had any material effect on imports.
mption (e.g. for re-export) are eliminated in order to obtain for 1931 and 1932 a basis similar to that used in the official reports for 1933, 1934 and 1935.
con.
which is admitted duty free.
from Philippines and Virgin Islands.
mmerce, Bureau of Foreign and Domestic Commerce, "Monthly Summary of Foreign Commerce of the United States," issues of September 1931; June, July, August and September,

A drastic decline in exports of certain of the agricultural commodities subject to the processing tax has been going on since 1934, and, in some cases, since the latter part of 1933. During 1935 this decrease in exports has been accelerated to such an extent that, as shown in the accompanying tables, increasingly heavy imports have been necessitated in order to take care of the consumption requirements of the United States.

It will be noticed that exports of hogs, corn and wheat have almost reached the vanishing point, after two years of the Agricultural Adjustment Act. The only gains in exports of commodities subject to the processing tax which were not merely temporary were the small increases in the value of the tobacco exported in 1935 (at a sacrifice in *volume* of tobacco exports); and the increase in the value of sugar and related products exported, which was more than offset by the increase in the value of sugar imports. At the same time, the statistics (see tables opposite) show that there has been an extraordinary increase in the last nine months in importations of most of the commodities subject to processing tax.

That this is by no means merely a sudden development, but rather one having its origin near the beginning of the AAA, is shown by the following statement in a pamphlet published in August, 1935, by the Bureau of Foreign and Domestic Commerce, Department of Commerce, and dealing with the foreign trade of the United States during 1934:

> "In sharp contrast to the gains in exports of leading industrial products, *our major export product—raw cotton—dropped 30 per cent in quantity and 6 per cent in value.* The total of approximately 3,149,000,000 pounds of unmanufactured cotton valued at $373,000,000 in 1934 represented the smallest annual quantity exported in more than a decade. Allowing for the normal seasonal changes, the month-to-month de-

cline became accelerated as the year advanced. In the last four months of the year, the season when cotton normally moves in greatest volume, shipments amounted to only 1,169,000,000 pounds, 40 per cent less than in the same months of 1933 *and the smallest quantity shipped in that period of the year since the war year 1918.*"[6] (Italics supplied.)

It is respectfully urged that this matter of fact statement by a government bureau of the effect of the Agricultural Adjustment Act on "our major export product" in the year 1934, is alone sufficient to cast grave doubt on the Government's contention that the Act was "soundly constructed" to aid in restoring general economic activity.[7]

It is evident from the statistics in the tables, that the principle upon which the Agricultural Adjustment Act is based—the principle of scarcity—has resulted in a demoralization of the United States export trade in certain agricultural commodities and an increase in imports of commodities normally produced by American farmers. Not only does this mean competition for such farmers in their home market, but an inevitable loss of foreign markets, where, due to the depletion of the supply of American commodities, they can no longer meet the demand at the

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[6] Department of Commerce, Bureau of Foreign and Domestic Commerce, Trade Promotion Series—No. 162, *Foreign Trade of the United States,—calendar year 1934*, by Grace A. Witherow, Division of Foreign Trade Statistics, p. 19.

[7] See also U. S. Department of Agriculture, Agricultural Adjustment Administration, *Regional Problems in Agricultural Adjustment* (1935), p. 55:

"Unless some means can be devised for regaining the United States export market for wheat; the present drastic limitation of export outlets will continue to complicate the adjustment problem for all wheat, and particularly for those classes in which exports have been most heavily curtailed."

world prices.[8] A concrete example of this situation is furnished by a statement appearing in a report of the Bureau of Agricultural Economics, dated March 14, 1935:

> "Oriental countries which formerly obtained most of their wheat imports from North America, are now taking the bulk of their requirements from the Southern Hemisphere, . . . During the current year shipments to Japan and China have shown a marked increase over those of a year earlier despite relatively large domestic supplies *but more than three-fourths of the shipments are of Australian origin with those from the United States and Canada less than half as large as last season.*"[9]

With respect to cotton, the Government admits (Brief, p. 290) that during 1933, 1934 and 1935 "the cotton production abroad has totaled approximately one million bales in excess of that which it probably would have reached in the absence of stimulation from the higher prices due to the American adjustment programs." The Government's brief seems to minimize the importance of this increase in foreign production of cotton, by comparing it with the reduction of 10,000,000 bales in American cotton during the years 1933-1935.

The importance of the increase in foreign production is not merely in its amount, however. The significant and dangerous point is that the foreign cotton is finding an

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[8] The Bureau of Agricultural Economics, Department of Agriculture, on October 29, 1935 (*World Wheat Prospects*, p. 4), stated that "United States prices continue considerably above export levels, which is to be expected during most, if not all, of the 1935-36 season, supplies of millable hard wheat being less than domestic requirements."

[9] U. S. Dept. of Agriculture, Bureau of Agricultural Economics, Hay, Feed and Seed Division, Market News Service, *Special Wheat Review*, Washington, D. C., March 14, 1935.

increasingly ready market; and while the foreign *consumption of American cotton* is diminishing, the foreign *consumption of foreign cotton* is increasing. And this is true despite the great difficulties to be overcome, and the time and investments required, in bringing new land suitable for cotton under cultivation. The investment having been made in clearing and preparing land, in ginning mills and in cotton-seed oil mills abroad, the foreign competition may now be classed as permanent. The following tabulation will present clearly this shift in consumption of cotton, which, it is submitted, is in large measure attributable directly to the effect of the Agricultural Adjustment Act.[1] The decrease in the consumption of

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[1] "Most of the decline that occurred in the consumption of American cotton from 1933-34 to 1934-35 is accounted for by the decline in consumption in foreign countries as domestic consumption declined only 300,000 bales. A considerable part of the decline in consumption of American occurred in Germany, where the quantity of American cotton consumed was nearly 600,000 bales below the previous season. Smaller consumption of American also occurred in France, Italy, Japan, and a number of other countries. In practically all of these countries, however, the consumption of foreign cotton increased.

"Several factors contributed to the decrease in the consumption of American cotton in 1934-35 relative to the consumption of American cotton in 1933-34 and relative to the consumption of foreign growths of cotton in 1934-35. *One of the most important of these was the relatively high prices of American cotton due in part to reduced supplies of American cotton as a result of the adjustment program* and the drought and to increased supplies of foreign cottons and in part to the 12-cent loan, which in effect further reduced the available market supplies of American cotton." (Italics supplied.) U. S. Department of Agriculture, Bureau of Agricultural Economics, *The Agricultural Outlook for 1935-36*: The Cotton Outlook for 1936, pp. 6-7 (published November 4, 1935).

American cotton is all the more striking in view of the increase in the *total* foreign consumption of cotton in the year 1934-35.

Year	Foreign Consumption of *American* Cotton (bales)	Foreign Consumption of *Foreign* Cotton (bales)	Total Foreign Consumption of *All* Cotton (bales)
Aug. 1, 1932—July 31, 1933	8,167,000	10,049,000	18,216,000
Aug. 1, 1933—July 31, 1934	7,981,000	11,428,000	19,409,000
Aug. 1, 1934—July 31, 1935	6,074,000[2]	14,403,000[2]	20,477,000[2]

[2] Preliminary. Source: U. S. Dept. of Agriculture, Bureau of Agricultural Economics, Report on Acreage, Production, Carryover, Supply and Consumption of Cotton, Tables 3 and 7.

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IN THE

Supreme Court of the United States

October Term, 1935.

No. 401

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM M. BUTLER, ET AL., RECEIVERS OF HOOSAC MILLS CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Circuit Court Of Appeals For The First Circuit.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE and BRIEF.

JOHN E. HUGHES,
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Chicago.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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Petitioner,

v.

WILLIAM M. BUTLER, ET AL., RECEIVERS OF HOOSAC MILLS CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Circuit Court Of Appeals For The First Circuit.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE and BRIEF.

Comes now the undersigned, a member of the Bar of this Court, and hereby moves for leave to file herein the annexed brief as *amicus curiae* on behalf of the following named corporations: American Nut Co., Inc., General Candy Corp., Peanut Specialty Co., Fisher Nut Co., The

Warfield Co., Millard United Co., Nutrine Candy Co., Schutter-Johnson Candy Co., Williamson Candy Corporation and Purchasing Service Corporation.

There has been filed with the Clerk a letter from the Solicitor General and a letter from counsel for respondent, consenting to the filing of this brief.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago.

May It Please The Court:

No more basic or important questions than those presented in this case can come before this Court for answer, during the lifetime of its present members or at any other time.

QUESTIONS PRESENTED.

One of the questions presented in this case is whether the Congress has power under the guise of taxation to take property from the majority of the American people and in the same act which provides for its taking, provide for its transfer to a small minority of the American people.

If Congress has the power to take property from one class under the guise of taxation and in the same act transfer it to another class, it follows that the Federal Constitution presents no barrier to the execution of such schemes for the redistribution of wealth by means of taxation as were advocated by the late Huey Long.

There is also presented in this case the question of whether the taxing power granted in the Constitution by the people to the Congress is confined to raising money for the exercise of the powers conferred by the Constitution upon the Federal Government or whether it may be employed to regulate the purely local and intrastate acts of the people and thus nullify the *Tenth Amendment.*

Involved in this is the question whether the Congress has the power to make constitutional a law which would otherwise be a plain violation of the *Tenth Amendment* by merely imposing in it a tax to procure funds for its execution or to purchase with federal money results which it may not accomplish by direct legislation.

In answering this second question the Court will either on the one hand confine the exercise of the taxing power to the procurement of funds for the execution of the powers conferred by the Constitution on the central Government or on the other hand develop it into a monstrous many-tentacled octopus, capable of reaching into all the purely local affairs of the people (provided only it comes disguised as taxation) and irreparably breaking the bonds forged by the people in the *Tenth Amendment* for the preservation of their intrastate liberties, loose this destructive monster upon an already over-harassed, overburdened and over-governed people.

The case also presents the question of whether Congress may abdicate the discharge of the highly personal trust to make laws, delegated to it by the people in the Constitution by appointing a subagent for this purpose and after he has acted make his subagency good by passing a rubber stamp resolution of ratification.

THE ACT UNDER CONSIDERATION TRANSFERS PROPERTY WITHOUT COMPENSATION FROM THE OVERWHELMING MAJORITY OF THE AMERICAN PEOPLE AND BESTOWS IT UPON A SMALL MINORITY.

The original act which levied these taxes, in *Section 12 (b)* appropriated the taxes imposed

> "for the expansion of markets and removal of surplus agricultural products and the following purposes under *Art. 2* of this title: administrative expenses, rental and benefit payments and refunds on taxes".

Page 11 of the Government petition for the writ in this case states that up to June 30, 1935, $893,302,994.25 had been collected in processing tax and of this sum $727,195,627.83 had been expended up to May 31, 1935 for "rental and benefit payments to producers of basic agri-

cultural commodities, pursuant to contracts executed by reason of the provisions of the Act," and $64,196,026.27 had "been expended for the removal of surpluses".

The avowed purpose of the Act was to increase the income of farmers by bringing about an increase in the price of farm produce through limiting the production thereof. To accomplish this it was the design of the Act that no person might buy certain basic commodities except at a fixed minimum price.

Although this Act merely makes the Treasury Department a conduit through which the so-called taxes thereby imposed, pass from the processor to the farmer and hence the tax proceeds do not even in form become the general property of the Treasury to be used for the support of the Government, nevertheless, were it otherwise in form, it is elementary that in these matters the substance and not the form must govern.

Whatever may be said as to form, it cannot be denied that in substance the Act under consideration transferred the money collected in so-called taxes from the processors and consumers to the farmers for the avowed purpose of increasing the income of the farmers.*

It is stated by the Government on page 180 of its brief that the census of 1930 showed the total farm population of the country to be 30,445,350. This is of course a minor-

* The analogy attempted to be drawn in the brief of the American Farm Bureau between the Act under consideration and the Tariff Acts patently fails because the Tariff Acts do not provide for the payment of the customs duties to manufacturers, but instead provide for the payment of them into the Treasury where they are used for the support of the Army and Navy and for the execution of all the powers conferred upon the Federal Government by the Constitution. We are here assailing the direct tranfer of money by mean of taxation from one class to another and are not concerned with the debatable realm of the incidental, indirect or speculative effects of general laws.

ity of the nation's people, yet only a very small portion of this minority has secured benefits from the Act under consideration. It appears on page 210 of the Government's brief that the Government was at no time able to secure as many as a million votes on the question of whether this program should be continued. It is a fair assumption that substantially all the beneficiaries of this legislation voted and the surprising thing is that a noticeable number voted against its continuance.**

THE ATTEMPT OF THE CONGRESS TO TAKE PROPERTY FROM THE OVERWHELMING MAJORITY OF THE AMERICAN PEOPLE WITHOUT COMPENSATION AND IN THE SAME ACT TRANSFER IT TO A SMALL MINORITY IN CONSIDERATION OF SUPPRESSING THE PURELY INTRASTATE PRODUCTION OF COMMODITIES, VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION.

That the people by the *Fifth Amendment* limited all the powers they had granted the central Government in the Constitution and that this includes the taxing power, is now thoroughly settled. *Heiner v. Donnan, 285 U. S. 312, 326; Nichols v. Coolidge; 274 U. S. 531, 542; Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 602.**

That the Congress has not the power to take property from one citizen without compensation and give it to another has been consistently recognized by this Court since it first began to sit. In *Calder v. Bull, 3 Dallas 386, 1 U.*

** A poll now being conducted by the Literary Digest shows that a majority of those voting are opposed to the continuance of the so-called "New Deal" policies.

* The war power is as essential to the national life as the taxing power, but the decision holding the Fifth Amendment a limitation upon the war power (Ex Parte Milligan, 4 Wall. 2, 121, 127) has been universally and uniformly acclaimed as one of the great expositions of the liberties of the people.

S. 172, 174 (decided in 1798),** Mr. Justice Chase, who had been a signer of the Declaration of Independence and a member of the Maryland Convention called to ratify the Federal Constitution and who had participated in its development and adoption, said:

> "There are acts which the federal, or state, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; *or a law that takes property from A. and gives it to B.* It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it." (Italics ours.)

In *Osborn v. Nicholson, 13 Wall. 654, 80 U. S. 654,* the Court said at page *662:*

> "The proposition, if carried out in this case, would, in effect, *take away one man's property and give it to another.* And the deprivation would be 'without

** At that time this Court consisted of six members and two of the other members, Justices Patterson and Wilson had been distinguished members of the Constitutional Convention.

due process of law'. This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation. *(Taylor v. Porter, 4 Hill, 146; Wynehamer v. The People, 13 N. Y. 394; Wilkinson v. Leland, 2 Pet. 658.* What would be the effect of an amendment of the National Constitution reaching so far—if such a thing should occur—it is not necessary to consider, as no such question is presented in the case before us."

In *Citizens Savings and Loan Association v. Topeka, 20 Wall. 655, 87 U. S. 655, 663,* this Court said:

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should not longer be his, but should henceforth be the property of B. *Whiting v. Fond du Lac, 25 Wis. 188; Cooley, Const. Lim., 129, 175, 487; Dill. Mun. Cor., sec. 587.*

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. * * * This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid

private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. 'A tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State.' 'Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes.' *Cooley, Const. Lim., 479.*

Coulter, J., in *Northern Liberties v. St. John's Church, 13 Pa. St. 104,* says, very forcibly, 'I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose.' See, also, *Pray v. Northern Liberties, 31 Pa. St. 69; Matter of Mayor of N. Y., 11 Johns., 77; Camden v. Allen, 2 Dutch., 398; Sharpless v. Mayor, supra; Hanson v. Vernon, 27 Ia. 47; Whiting v. Fond du Lac (supra).*

We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed, falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to

the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two thirds of the business men of the city or town.

A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed, to sustain us in this proposition."* (Italics ours.)

The existence of such limitations upon the power of taxation was admitted in argument by Attorney General Olney in the *Pollock case (157 U. S. 507)* and by the Assistant Attorney General, Mr. Whitney, who conceded that a purported exercise of the taxing power might in reality be an exercise of the power of eminent domain and require just compensation (p. 474), and Mr. Justice Field in his opinion said at page 599:

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* The due process clause of the Fifth Amendment means the same thing as the due process clause of the Fourteenth Amendment. Heiner v. Donnan, 285 U. S. 312, 326.

"As stated by counsel: 'There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations, as he justly observes, of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.' *Citizens Sav. L. Asso. of Cleveland v. Topeka, 87 U. S. 20 Wall. 655,* and *Parkersburg v. Brown, 106 U. S. 487.*

The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax." (Italics ours.)

The so-called tax in the case at bar utterly fails to meet this test because instead of being levied for the support of the Government and the execution of the powers conferred by the Constitution upon the central Government it is levied solely for the purpose of increasing the income of farmers and as a means to that end the money raised by the tax is paid to them in order to suppress production and thus limit the supply of necessities of life and thereby increase the price all of us pay for these necessities. Indeed if people other than farmers were to band together to accomplish such ends by such means, they would be indictable for conspiracy in restraint of trade under the laws of most of the states.

For cases to the same effect, see *Parkersburg v. Brown, 106 U. S. 407, 500; Cole v. Lagrange, 113 U. S. 1, 6,* and *Ochoa v. Hernandez y Morales, 230 U. S. 139, 161.* In all of those cases it was argued that the tax laid and collected for the benefit of private business interests would eventually result in benefit to the entire community and

in promoting the general welfare of the community but that contention was rejected by this Court. It has also been rejected by State Courts in cases of which *Lowell v. Boston, 111 Mass. 454, 461,* is typical.

It is settled that the provisions in the Constitution for the protection of life, liberty and property are to be largely and liberally construed in favor of the citizen. *(Fairbank v. United States, 181 U. S. 283, 289.)* It must be remembered that at the time the Constitution was adopted the principal grievance from which the Colonies had recently suffered and the primary cause of the Revolution lay in the abuse by the Crown of the power of taxation. These abuses were fresh in the mind of the people and they thought they were safeguarding against them by the *Fifth Amendment.* Some of the consequences which may follow the failure to hold that the *Fifth Amendment* prohibits the transfer of property from one class of the American people to another under the guise of taxation is illustrated by the example given at page 15 of this brief.

THE SPIRIT OF THE CONSTITUTION CONFINES THE TAXING POWER TO THE RAISING OF MONEY FOR THE EXERCISE OF THE POWERS CONFERRED BY THE PEOPLE IN THE CONSTITUTION UPON THE FEDERAL GOVERNMENT.

When determining the nature and extent of the powers conferred by the people in the Constitution upon the Federal Government, it is indispensable to keep in view the objects for which these powers were granted. The language of each grant of power must be construed with reference to the general purpose of the instrument.

The powers which the people desired the Federal Government to exercise they expressly conferred upon it in

the Constitution and inasmuch as money was necessary for the exercise of these powers they conferred the taxing power upon the central Government. This power was intended only to provide money for the exercise of the other powers conferred upon the central Government and was not intended to be a broad, all-embracing power under the guise of which anything might be done. Otherwise the provision of the *Tenth Amendment* that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, or reserved to the states respectively, or to the people" would be completely nullified. In one of the most exhaustive and well-reasoned opinions dealing with the question now before the Court, *John A. Gebelein, Inc. v. Milbourne, 12 F. Supp. 105,* which we submit may be most helpful to the Court in deciding this case, the Court made the following observation at page *114:*

> "But before this new principle of permissible taxation is established it is well to contemplate the possible logical developments of the doctrine. Under it, it would be legally possible, if not politically probable, to impose a similar tax on agricultural products for the direct benefit of processors, on the felling of timber for the aid of saw mills, on the raising of sugar cane or beets for the aid of sugar refineries, and indeed on any class engaged in one branch of a whole industry for the benefit of another class in the whole process of getting the products of nature or of the factory to the ultimate consumer. *The final result would be to place the regulation of all industry in the United States under the practically complete control of Congress under the taxing power.*" (Italics ours).

Manifestly if the Act under consideration provided purely for the regulation of intrastate production among farmers and the suppression of that production it would not be authorized by any power granted in the Constitu-

tion. Merely annexing to it a tax to raise funds to insure that intrastate production will be limited, is an attempt to reach beyond the powers granted in the Constitution and grasp a power not granted in that instrument and support it by means of the taxing power. To permit this to be done would be to destroy the *Tenth Amendment* and to erect the taxing power into a Frankenstein which would permit Congress to exercise any power it chose. Indeed, to do so would not only be to destroy the *Tenth Amendment* but to destroy the Constitution itself. That this cannot be done this Court has already decided. *(Child Labor Tax case, 259 U. S. 20; Hill v. Wallace, 259 U. S. 44.)*

To sustain such a power by such specious reasoning as the argument advanced by the Government that Congress has power to lay a tax for any purpose and no citizen has a right to question the appropriation of tax money will ultimately result in the destruction of the Constitution and the centralization of all power in the Federal Government.*

To prevent the unconstitutional and illegal predatory pillage from one class of hundreds of millions of dollars in the future and its transfer to another, it is submitted that this Court should now declare and decide that the exercise of the taxing power granted in the Constitution is limited to supplying funds for the exercise of the other powers thereby granted to the Federal Government.

If the law now under consideration is sustained, there is nothing in the Federal Constitution to prevent the 56%

* The Social Security Act undertakes in some instances to lay a "tax" of $81.90 a year on a business employing a $25.00 a week stenographer for the purpose of providing old age pensions. This is merely indicative of the kind of legislation which may be expected to sprout from the "Brain Trust" theory. However much all of us are in favor of such humane legislation we can find warrant for it neither in the letter nor in the spirit of the Constitution.

of the people who according to the 1930 census live in cities, from banding together and imposing a tax upon the farmers and providing for the distribution of this tax to themselves in consideration of "voluntarily" entering into contracts with the Government to remain idle, thereby limiting the supply of personal service and labor and increasing the price of that commodity on account of the scarcity thus produced.*

Then, indeed, will the way be open for class warfare** and for the realization of the pessimistic prediction of MacCaulay based on the premise that "your Constitution is all sail and no anchor". In this case we sound the alarm and call upon the Court to cast the anchor and save the Ship of State while there is still time by confining the taxing power to the raising of money for the purpose of performing only the acts which the Federal Government is authorized by the Constitution to do. If the argument of the Government prevails, money may be raised by taxation and expended for any purpose whatsoever, including wholly unconstitutional purposes; and results which the Federal Government could not accomplish by direct legislation it may just as effectively accomplish through buying them with Federal money and thus render the constitutional restrictions on the power of the Federal Government a dead letter.

In *Gibbons v. Ogden, 9 Wheat. 1,* Chief Justice Marshall said at page *199:*

> "Congress is not empowered to tax for those purposes which are within the exclusive province of the States".

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* Reference is made to the remarks of John Stuart Mill on the "tyranny of the majority" in his essay on "Liberty".

** The taxation of one class, the people, for the benefit of the nobility and clergy brought about the French Revolution and Reign of Terror.

It is within the knowledge of this Court that Federal money has in recent years been prolifically expended for purposes not within the scope of the powers conferred by the Constitution upon the Federal Government. To decide at this time that the taxing power is confined solely to raising money for the execution of the powers conferred by the Constitution upon the Federal Government will check the accumulation of billions of dollars of debt and the saddling of it upon future generations, increase the Federal credit, stabilize its currency and afford life, liberty and property some measure of that protection against the reckless acts of temporary administrations which the Constitution was intended to secure.

It is hardly possible to overemphasize that the limitations of the Federal Constitution may be circumvented and nullified if the Federal Government by the expenditure of Federal money can accomplish the results of acts prohibited to it and reserved by the Constitution to the States alone or to the people.

THE LEGISLATION UNDER CONSIDERATION VIOLATES THE CONSTITUTIONAL PRINCIPLE OF THE SEPARATION OF POWERS.

Montesquieu in 1748 published in his book "The Spirit Of The Laws" in which he pointed out history taught the lesson that whenever the legislative, executive and judicial powers were united and not separated the ultimate result had been tyranny. This book, which the Encyclopedia Britannica states was the greatest French book of the 18th Century, had a great influence with the Members of the Constitutional Convention and they therein provided for the separation of powers and considered this provision necessary to insure the liberties of the people.

The debates in the Constitutional Convention show that the framers of the Constitution regarded this as the cornerstone upon which the Constitution was built and as the Keysone of the Arch of Liberty thereby sought to be preserved. It is obvious that if one of the three great and separate departments of the Government can delegate its powers to another, the result will be a merger of these powers in one of them and unless this ultimately ends in tyranny history will fail to repeat itself. This Court has demonstrated that it appreciates the consequences of the philosophy of Government which produced the Act under consideration and that it will be vigilant to preserve the separation of powers. *(Schechter Corp. v. United States, 295 U. S. 495.)*

As ably shown in *John A. Gebelein, Inc. v. Milbourne, 12 F. Supp. 105,* at page *116,* Congress delegated to the Executive Department "(1) *what* to tax;* (2) *when* to tax; (3) *how long* to tax, and (4) *at what rate* to tax".

Because the taxing power is granted to Congress alone, it cannot delegate it to the Executive Department and on this ground alone the Act is invalid.** The attempt to ratify this illegal grant is ineffectual because Congress could not authorize it in the first place. If once the ratification theory contended for by the Government is established, Congress may delegate all law making to the Executive and convene for a week or a day and pass a general resolution ratifying and confirming whatever he has done. This was never contemplated by the framers of the Constitution.

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* On some commodities made taxable by the Act the Secretary has imposed a tax. On others he has not. He has also imposed a tax on what he considers competing commodities.

** So held in F. G. Vogt & Sons v. Rothensies, 11 F. Supp. 225.

The argument on page 110 of the Government's brief wherein it is said of the Treasury officials "it may be that their determination that the tax should be assessed at the rate it was and on the products it was, resulted from the exercise by the Secretary of Agriculture of improperly delegated legislative authority," but that this does not matter because Congress has ratified his act proceeds upon a fallacious premise. It assumes that Congress is the principal, whereas Congress itself is merely the agent of the people. The principal is the people. It is fundamental that an agent may not delegate his authority and inasmuch as he may not do so he cannot accomplish the same thing by so-called "ratification" for the reason that he has no right to authorize the Act in the first place. One may only ratify that which can properly be delegated in the first instance.

The cases cited by the Government deal with conquered *territory* (the Philippine Islands) to which the governmental powers reserved by the Constitution to the *States* have no application. *(Dorr v. United States, 195 U. S. 138.)*

COMMENTS ON THE GOVERNMENT'S BRIEF.

The case of *Graham & Foster v. Goodcell, 282 U. S. 409,* cited and relied upon at page 115 of the Government's brief, was a case in which this Court sustained *Section 611 of the Revenue Act of 1928,* which denied to taxpayers a recovery of tax otherwise owing but collected after the statute of limitations had expired in cases where taxpayers had delayed the collection beyond the statutory period by their own act in filing a claim in abatement. Although *Section 611* did not mention a claim for credit, yet there is no substantial difference between the two claims and this Court in the later case of *Stearns Co. v. United States, 291 U. S. 54,* held that in cases where tax-

payers delayed collection beyond the statutory period by filing a claim for credit, the Government had the common law and equitable defense of estoppel and the taxpayer could not recover. From this it follows that *Section 611* upheld by the Court in the *Goodcell case* was superfluous in that it only gave the Government a defense which the Government would have had without it and deprived taxpayers of no right.

Pages 179 to 226 of the Government's brief are devoted to showing how bad conditions were among farmers when this legislation was enacted and how greatly they have improved up to the present time.* However, it does not follow from the fact that conditions were bad and that they have improved that improvement has been due to this legislation or that there would not have been a greater improvement had this legislation never been enacted.

During the argument of the *NRA case* in this Court the Attorney General argued that chaos would follow a holding that it was unconstitutional and a few days after the decision holding it unconstitutional was rendered the President in his "horse and buggy" statement predicted price slashing, wage cutting practices and nationwide labor disputes. None of these things happened. Instead what happened was that business, convinced that this Court would stand unswervingly by its oath and protect it against unconstitutional, socialistic encroachments, went ahead with renewed vigor and an immediate improvement in conditions was the result and they have continued to improve up to this date.

* The President in his speech at Atlanta on November 29th last, claimed that the improvement was due to this legislation, the purpose of which he frankly made apparent, was to control and limit production within the States and thereby increase prices.

Moreover, even if legislation is concededly beneficial during a period of economic emergency, it is more important that the liberties of the people which the Constitution seeks to preserve be protected than that the people enjoy some temporary comfort, just as it was more important that thousands should have died to protect and preserve the Constitution than that they should have lived and the Constitution be destroyed. Otherwise future generations would live under despotism and tyranny.

To the argument that the framers of the Constitution could not foresee all future conditions which might arise in a complex civilization and hence the Constitution should be elastically expanded, the obvious answer is that the framers realized their inability to foresee the future and provided for it in the Constitution itself through the provision for its amendment. If the Constitution is to be amended, this should be done in the manner therein provided and not by executive or legislative usurpation. The facility with which it may be amended when the people desire to do so is demonstrated by the recent repeal of the prohibition amendment.*

All of which is respectfully submitted.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,
Amicus Curiae.

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* Andrew Jackson, in his message of May 27, 1830, vetoing a bill to authorize the subscription of stock in the Maysville, Washington, Paris, and Lexington Turnpike Road Co., said:

"If it be the wish of the people that the construction of roads and canals should be conducted by the Federal Government, it is not only highly expedient, but indispensably necessary that a previous amendment to the Constitution delegating the necessary power and defining and restricting its exercise with reference to the sovereignty of the States should be made." (Messages and Papers of the President, Vol. II, p. 491.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 401

UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIAM M. BUTLER, ET AL., RECEIVERS OF HOOSAC MILLS CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

O. O. HAGA,
Counsel for Farmers National Grain Corporation, as amicus curiae.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Farmers National Grain Corporation, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

O. O. HAGA,
Counsel for Farmers National Grain Corporation.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST DISTRICT.

BRIEF OF FARMERS NATIONAL GRAIN CORPORATION, AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

Farmers National Grain Corporation is the national grain marketing cooperative organized to operate as such under the Agricultural Marketing Act of June 15, 1929. It has in its membership some 23 regional and state cooperatives and some 2,500 local country elevators, and it is esti-

mated that some 300,000 producers use its services in marketing cooperatively.

As was stated in 1933 by the Circuit Court of Appeals for the Seventh Circuit, in a case in which the Board of Trade of the City of Chicago unsuccessfully attacked the cooperative status of Farmers National Grain Corporation:

> "Farmers National is a Delaware corporation, organized and licensed to do business in Illinois. Its charter provides that only cooperative associations dealing in cash grain, and which comply with the requirements of the Capper-Volstead Act (7 U. S. C. Sections 291, 292 (7 U. S. C. A. Sections 291, 292)), may hold its stock, and that individuals may not be stockholders. Its by-laws restrain it from dealing in the products of nonstockholders to an amount greater in value than such as are handled by it for stockholders; and they specify that dividends on its stock shall not exceed 8 per cent of its par value, and that net profits beyond dividends or for establishing a reserve shall be distributed among its stockholders upon a patronage basis. The charter of Farmers National empowers it to deal generally in grain, by itself or through subsidiaries, and to act as agent or broker for others. * * *
>
> It is fairly to be gathered from the record that the stockholders of Farmers National are all cooperative associations of producers, of which Farmers National is the duly authorized representative or marketing agency, and is lawfully entitled to invoke in its own name, but for the sole benefit of its constituent cooperatives, such relief as the constituents might jointly or severally have invoked on their own behalf, though probably not so effectively as could this single or common marketing agency or representative acting on behalf of many associations.
>
> The Federal Farm Board, constituted by the Agricultural Marketing Act to administer its functions, and by it granted broad powers, including that of loaning public money to cooperative associations (7 U. S. C. Section 521 *et seq.* (see 12 U. S. C. A. Sec. 1141 *et seq.*)), evidently recognized Farmers National as a lawful and proper agency for carrying out the purposes of the act by advancing to it many millions of dollars

of public funds wherewith it might carry on upon a scale so large that an aggregation of numerous individual cooperatives must have been in contemplation."

(*Board of Trade of City of Chicago* v. *Wallace*, 67 Fed. (2nd) 402, 403, 404, 405.)

Farmers National Grain Corporation is nonpartisan in that its producer members belong to all political parties and no attempt has ever been made to count noses in this regard, and of course there has been no discrimination as to membership because of political affiliation. Further, the Corporation has been recognized as the national grain cooperative from its inception, first by the Hoover administration, and second by the present Roosevelt administration—in the first case by loans from the old Federal Farm Board, functioning under the Agricultural Marketing Act, and in the second case by loans from the Farm Credit Administration, functioning under the Agricultural Marketing Act, as amended.

Farmers National Grain Corporation therefore thinks that it may fairly speak for the grain producers of the United States who market cooperatively. Speaking for them, it desires to express to this Court the conviction that efforts in the direction of improving the national agricultural situation through cooperative marketing must be supplemented by production control, and that an adequate and proper method of such control is to be found in the Agricultural Adjustment Administration under attack in this cause.

Because of the vital interest of the some 300,000 producers affiliated with Farmers National Grain Corporation it feels justified in imposing upon the time of the Court for consideration of this brief.

ARGUMENT.

Farmers National Grain Corporation joins and concurs in all respects in the brief filed in this cause on behalf of the United States of America.

For this reason any protracted legal analysis of points covered in the brief for the United States would only be unnecessary duplication. However, Farmers National Grain Corporation would again like briefly to direct the attention of the Court to the factual situation which makes the Agricultural Adjustment Act legislation within the province of Congress under the General Welfare clause of the Constitution.

The agricultural plant was greatly expanded during the World War, both because of the profitable demand for agricultural commodities and because of the appeal made to farmers to produce at the maximum because "food will win the War." Since agriculture was unable to adjust its output to the lessened demand following the close of the War it was unable to share in the prosperity which followed. Burdensome surpluses piled up throughout the country to the distress of producers and their creditors. Prices on agricultural commodities declined steadily and to such an extent that some crops had no market value whatever at the point of production. Harvesting, handling and transportation costs were greater than the value of the commodities in central markets. Some crops rotted in the fields, and others wasted after being gathered. During this period agriculture maintained itself only at the expense of its capital structure. It could not buy the products of industry nor pay even the interest upon its capital debt. The tariffs behind which industry maintained its prices through

adjusted production and organized selling were of little or no value to agriculture.

The Congress recognized this situation and in 1929, under the Hoover administration, passed the Agricultural Marketing Act and provided for a Federal Farm Board. Charged with responsibility for establishing and maintaining fair agricultural prices and faced with such a condition, the Federal Farm Board attempted to induce farmers, by voluntary action, to reduce their production. On August 12, 1931 the Farm Board sent a telegram to Governors of certain cotton states, urging the plow-up of cotton, and gave the following release to the press:

> Release morning newspapers,
> Thursday, August 13, 1931.
> 8-12-31.
>
> The Federal Farm Board today (August 12), sent to the Governors of Alabama, Arizona, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas, the following telegram:
>
> "Government cotton report of fifteen million five hundred eighty-four thousand bales if realized provides total crop and carryover supply of American cotton of more than twenty-four and one-half million bales against probable world consumption of American cotton this fiscal year of thirteen million or possibly fourteen million bales leaving probable carryover one year hence of around eleven million bales Stop This condition occurs in spite of ten per cent reduction in acreage last spring Stop It has already resulted in drastic declines in cotton prices which if allowed to continue may bring direct disaster to cotton producing states and indirect distress to the nation Stop Through serious world depression of last two years Federal Farm Board has steadfastly attempted to protect cotton farmers and all who deal with them from price declines such as have affected all industries first by sixteen cent loans to cotton cooperatives second by removal from market by Cotton Stabilization Corporation of thirteen hundred thousand bails third by ninety per cent loans to cooperatives last year Stop These ef-

forts had some measure of success but have been outweighed by continual excess production and continually increasing surplus Stop Board believes that time has now come when cotton producers themselves must be called upon for immediate and drastic action Stop Agricultural Marketing Act Section One Paragraph Four directs Board to aid quote in preventing and controlling surpluses and in orderly marketing and distribution so as to prevent such surpluses from causing undue or excess fluctuations or depressions in price for the commodity unquote Stop Section Five Paragraph Four quote the Board is authorized and directed to investigate conditions of overproduction agricultural commodities and advise as to the prevention of such overproduction unquote Stop In line with above mandate from Congress and in view existing situation Board suggests that you immediately mobilize every interested and available agency in your state including farmers bankers merchants landowners and all agricultural educational forces to induce immediate plowing under of every third row of cotton now growing Stop Without question at present low prices there will be considerable abandonment late in the season but this will not improve prices during heavy marketing Stop Problem to be solved is to secure abandonment in an organized and orderly fashion which will give farmers a better return on the remainder Stop Board is convinced that such organized reduction immediately done will be more than repaid by increased price received by growers on this and future crops entirely aside from savings by reason of no picking and ginning costs on that part of crop plowed under Stop Board recognizes that this suggestion calls for drastic remedy for serious emergency but commends to you the thought that major operation of this kind rather than attempts at lesser measures is now needed Stop Board earnestly hopes this proposal which is being sent Governors of all cotton producing states will be approved by you and the people of the South and that necessary steps will be immediately taken to put it into effect on basis which will begin reduction throughout South not later than September first and complete program not later than September fifteenth Stop If the ten largest cotton producing states accept and carry out this program this Board will do all in its

power to support the program and will pledge itself to permit no sales by the Cotton Stabilization Corporation of its present holdings before July thirty-first nineteen thirty-two and will urge upon the cotton cooperatives financed by the Board the desirability of similar action by them on their stocks of nineteen thirty cotton now held Stop This program if fully carried out by Southern farmers as well as by ourselves will mean reduction of total supply by at least four million bales and withholding from this years market of three million bales more Stop You will appreciate necessity for very prompt action if this plan is to effectively benefit farmers this Fall and you are therefore urged to immediately advise us your attitude toward cooperation on it Stop Board will promptly convey to you reactions from other States as received.

FEDERAL FARM BOARD,
JAMES C. STONE,
Chairman."

Alexander Legge, first Chairman of the Federal Farm Board, and Arthur M. Hyde, Secretary of Agriculture, had theretofore made a tour of the wheat states, urging producers to cut their acreage. Both of these Farm Board proposals failed for lack of a practical governmental device for bringing about such adjustment.

The Agricultural Adjustment Act is a mechanism which makes possible this necessary adjustment of production to potential profitable demand throughout the United States in connection with major crops.

The right of Congress to levy customs is unquestioned, even though no revenue may result, or even though losses to the government may occur through the maintenance of machinery for collecting customs on commodities which cannot move over the tariff wall.

The Agricultural Adjustment Act produces revenue. An additional step, appropriation of funds, is necessary to

make the Act effective as a farm tariff. Through this farmers are for the first time provided with a tariff equally effective with the tariffs provided industry, and are given a practical means of adjusting their output in reasonable relation to demand. With the Agricultural Adjustment Act in effect the decline in agriculture has been checked and agricultural recovery seems now soundly under way. The first and strongest impulse toward general economic recovery and re-employment arises from renewed agricultural purchasing power. The immediate and long-time economic and social interests of the whole people depend substantially upon the inclusion of agriculture in the general protective system which has been adopted by the United States, through a practical and effective device which is the protective equivalent of the more usual forms of tariffs. The Agricultural Adjustment Act is such a device.

It is submitted that the taxes under attack in this cause are valid and that the decision below here under review should be reversed.

Respectfully submitted,

O. O. HAGA,

Counsel for Farmers National Grain Corporation, as amicus curiae.

November, 1935.

FILE COPY

DEC 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1935. No. 401.

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM M. BUTLER ET AL., Receivers of Hoosac Mills Corporation,
Respondents.

BRIEF OF AMICI CURIAE WITH PETITION AND NOTICE.

WM. B. BODINE,
Attorney for Amici Curiae.

2231 Land Title Building,
Philadelphia, Pa.

Martin & Lyle, 302 Penfield Bldg., Phila., Pen. 0665, Keystn. Race 6067.

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IN THE

Supreme Court of the United States

October Term, 1935. No. 401.

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM M. BUTLER ET AL., Receivers of Hoosac Mills Corporation,
Respondents.

NOTICE OF MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE.

PLEASE TAKE NOTICE that the undersigned, acting as counsel for litigants interested in the questions involved in the above entitled suit, will move this Court at the hearing of this case on the 9th day of December, 1935, or as soon thereafter as the case may be heard, for leave to file a brief as *amici curiae* and for such other or further relief as may be proper.

Philadelphia, December 3, 1935.

WM. B. BODINE,
Attorney for Amici Curiae.

To:

HON. STANLEY REED,
Solicitor General of the United States,
Attorney for Petitioner.

EDWARD R. HALE,
BENNETT SANDERSON,
49 Federal Street,
Boston, Mass.,
Attorneys for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1935. No. 401.

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM M. BUTLER ET AL., Receivers of Hoosac Mills Corporation,
Respondents.

PETITION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned respectfully petitions this Honorable Court for leave to file a brief *amici curiae* in the above entitled suit.

Your petitioner applies as counsel for the concerns whose names are given in the footnote.* Each of these concerns is a processor of hogs, a basic agricultural commodity, in one or more plants located and operated in the United States. As such, it is subject in that respect to the terms and provisions of the Agricultural Adjustment Act, familiarly known as the AAA. And against each, the United States is asserting its right to assess and collect taxes under the terms and provisions of said Act.

---

*Berks Packing Co.,Inc.
Louis Burk, Inc.
Chester Packing & Provision Co.
John J. Felin & Co., Inc.
Ch. Kunzler Co.
C. T. Nelson
A. C. Roberts
Reading Abattoir Co.
Jacob Ulmer Packing Co.
Shenandoah Abattoir Co.
F. G. Vogt & Sons, Inc.
Weiland Packing Co., Inc.
John A. Gebelein, Inc.
William F. Myers' Sons, Inc.
The Wm. Schluderberg—T. J. Kurdle Co.
William F. Stump
Wilmington Provision Co.
Taylor Packing Co.
Perry Packing & Provision Co.
The Tobin Packing Co.
Albany Packing Co., Inc.
Knauss Bros., Inc.
Scala Packing Co., Inc.

Each of these concerns has brought a suit in equity in a Federal District Court (as have other like concerns, so that the number of such suits now aggregates largely over eighteen hundred) in which is sought an order restraining the further collection under said Act of taxes accrued both before and after the amendments of August 24, 1935, on the ground that said Act is wholly unconstitutional and that the claim for refund, for many years existing as an established procedure for contesting such constitutionality, has been so circumscribed by amendments to the said AAA as to render said procedure totally inadequate as a legal remedy as well as entirely lacking in the elements of due process of law required for that purpose.

Each of said concerns, therefore, is vitally interested in a decision of the constitutional questions presented in the above entitled suit.

Notice of this application having been served on counsel for the respective parties in the above entitled suit, this motion is now respectfully submitted for the consideration and action of the Court.

Philadelphia, December 5, 1935.

WM. B. BODINE,
Attorney for Amici Curiae.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1935. No. 401.

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM M. BUTLER ET AL., Receivers of Hoosac Mills Corporation,
Respondents.

BRIEF OF AMICI CURIAE.

PRELIMINARY STATEMENT.

The concerns listed in the foregoing petition file this brief *amici curiae* in opposition to the contention of the United States that the Agricultural Adjustment Act, familiarly known as the AAA, is constitutional and gives to the United States the right to assess and collect taxes in the manner and for the purposes it provides.

Each of said concerns is a processor of hogs, a basic agricultural commodity, in one or more plants located and operated in the United States. As such, it is subject in that respect to the terms and provisions of said AAA. And against each, the United States is asserting its right to assess and collect under the terms and provisions of said Act, taxes accrued and accruing before and after the 1935 Amendments.*

Each of these concerns has brought a suit in equity in

*Public No. 320, 74th Congress, approved August 24th, 1935, for brevity in this brief called "the 1935 Amendments".

a Federal District Court (as have other like concerns, so that the number of such suits now aggregates largely over eighteen hundred) in which is sought an order restraining the further collection under said Act of taxes accrued both before and after the amendments of August 24, 1935, on the ground that it is wholly unconstitutional and that the claim for refund, for many years existing as an established procedure for contesting such constitutionality, has been so circumscribed by limitations thereof by Sec. 21, added by Sec. 30 of the 1935 Amendments, as to make said procedure an inadequate legal remedy and entirely lacking in the elements of due process of law required for that purpose.

Thus, each of said suits presents the very same constitutional questions that are involved in the above entitled suit, as well as the right of these concerns to contest such constitutionality by suit in equity, in view of the exceptional circumstances presented by the novel provisions of the AAA and the inadequacy of, and lack of due process in, the procedure by claim for refund under the said limitations thereon.

This brief is filed in order to assist the Court in studying the AAA as a whole and not merely in its application to the cotton industry. Since it is filed in the interest of the processors of hogs, emphasis will be laid upon those features of the statute which particularly affect that industry. This means that the argument is chiefly a discussion of Delegation of Legislative Power. The contention of unconstitutionality on grounds other than excessive delegation is set forth only in outline, since the discussion of such other grounds in the brief of the respondents leaves nothing to be desired.

ARGUMENT.

I.

THE PROCESSING AND FLOOR TAXES ARE NOT INDEPENDENT EXERCISES OF THE TAXING POWER AS SUCH BUT ARE INTEGRAL PARTS OF A SCHEME FOR THE FEDERAL REGULATION OF INTRASTATE AGRICULTURAL PRODUCTION.

1. That the objective of Congress is to adjust production to consumption and not primarily to raise revenue is abundantly clear from the declaration of Policy in Sec. 2 of Title I.

2. That the adjustment is to be made by controlling and reducing agricultural acreage and production appears from Sec. 8(1) of Title I. It is there made clear that this reduction is to be accomplished by bringing economic pressure to bear upon the farmer. Such pressure takes the form of a payment of rentals or benefit payments of money in exchange for the farmer's promise to subject himself to the federal scheme of production-control.

3. That the so-called tax is merely a cog in the mechanism of control appears from the following considerations:

(a) There is no tax until the Secretary of Agriculture determines that rental or benefit payments are to be made. See Sec. 9 (a). In other words, the making of rental or benefit payments is the sole occasion for the tax.

(b) The declared objective being to close the gap between the farmer's financial condition today and his condition in a pre-war period, the rate of the tax is declared to be the extent of such gap. Sec. 9(b). In other words, there is no relation what-

ever between the rate of tax and the activity of the processor, except that the extent of the gap in the farmer's income is translated into such-and-such a sum per pound of raw material processed. Congress in so many words has said "We exact from the processor a sum equal to our estimate of what the farmer should be receiving in addition to his present income."

(c) The sum so exacted is to be paid into the treasury but is by the act itself so appropriated as to be available to the Secretary of Agriculture for rental and benefit payments and other features of the reduction program. Sec. 12(b). In other words, the tax and its use are so related that, except for the specified use, there would be no tax, and except for the tax, the scheme could never go into effect.

(d) The tax terminates at the end of the marketing year current at the time the Secretary determines to discontinue rental and benefit payments. Sec. 9(a). In other words, just as the proposed exercise of control is the occasion of the tax, so a determination to abandon control marks the end of the tax.

(e) Since the object of the scheme of federal control is to enable the farmers to get higher prices for their products, and so close the gap, it must follow that if (for example) the processors of hogs had voluntarily paid to their several vendors such prices as would close the gap there never would have been any tax whatever.

(f) While the formula for the tax rate is specified in the act, the Secretary of Agriculture is given discretion to lower it (Sec. 9(b)); he is (by Sec. 15(a)) given authority to exempt the processing of any commodity from all tax whatever, and even to

refund what has been paid; and he is empowered by Sec. 15(d) to impose compensating taxes of unspecified amounts upon commodities competing with basic commodities.

In view of the foregoing we submit that what Congress has done is not to exercise its taxing power except as part of a regulatory scheme, the administration of which it has confided to an executive official. The next question for consideration, therefore, is whether the tax must stand or fall according to the validity or invalidity of the regulatory scheme.

II.

SINCE TAXATION HAS BEEN RESORTED TO BY CONGRESS MERELY IN AID OF A REGULATORY SCHEME, THE TAX IS NOT COLLECTIBLE IF THE SCHEME ITSELF IS UNCONSTITUTIONAL.

1. A decision that a tax is uncollectible because obviously levied merely to accomplish a result beyond the power of Congress is a decision fatal to the processing taxes if a federal attempt to regulate production is invalid. On principle it should make no difference whether a producer is threatened with a tax if he does not cooperate or promised a benefit payment if he does. In either case, if the control acquired through his cooperation is beyond the power of Congress, the use of the taxing power to acquire it is an illicit use. If the use of the taxing power is illicit because of an illicit objective, payment of the tax ought not to be enforced merely because it is assessed against the processor and not against the producer.

2. The alleged voluntary character of the control purchased from the farmer does not validate the attempt to

gain such control by economic pressure instead of by penal sanctions. If Congress cannot prescribe a production-quota and enforce it by penalty it ought not to be possible to accomplish the same result with money exacted from the processor. If it is said that this is not an invasion of the area reserved to the States because, being a mere contract, it will be a nullity if opposed to local policy, the answer is that the Federal Government cannot be allowed to put itself in a position of inferiority to a State. Either the purchased control is effective in spite of contrary local policy or the making of a contract for subordinated control is not within the power of Congress.

III.

THE REGULATORY SCHEME OF WHICH THE TAX IS AN ESSENTIAL PART IS NOT WITHIN ANY POWER DELEGATED TO CONGRESS.

1. No justification for the attempted control can be found in the Commerce Clause. This act is, in the field of agriculture, the counterpart of NRA in the industrial field.

2. The Government accordingly appears not to rely on the commerce power but on the power to tax plus the supposedly uncontrollable power to spend. It is respectfully submitted that it is a contradiction in terms to speak of a Congress with limited powers and also to assert the existence of a power in that Congress to tax and spend for any and every purpose which the legislators deem conducive to public welfare. The true limit of taxation for the public welfare is the scope of the substantive powers granted to Congress in the Constitution. The power to tax is but an adjective power and cannot be so used as to enlarge the substantive powers. The doctrine that a citizen may not question an appropriation should have no application to a case

in which the question is raised not at a time when the money is already in the treasury but before the money leaves the citizen's pocket.

3. If the power to regulate production does not come from the commerce clause and cannot be inferred from the general welfare clause, it simply does not exist—and the whole regulatory scheme must fail.

IV.

IT IS NOT DUE PROCESS TO INTEGRATE AGRICULTURAL INDUSTRY AND COMPEL THE PROCESSING GROUP TO FINANCE THE PRODUCING GROUP.

1. While appropriations to promote the agricultural interest may be a legitimate use of public money, it does not follow that processors may be made the sole contributories to the fund. There is something inherently unfair in making the vendee pay money to the vendor to enable the latter to charge the vendee a higher price.

2. Even if the power to regulate agricultural production inheres in Congress and if, therefore, the power to tax may be invoked in aid of it, the Vth Amendment must be the citizen's protection against an abuse of the taxing power. We submit that to levy the processing tax is as much of an abuse as it would be to lay a tax on pacifists to pay for the building of battleships at a rate measured by their cost. A proper exercise of the taxing power presupposes a study of the ability of the taxable to pay and (in the case of an excise) some consideration of the activity in respect of which the tax is laid. If the procedure is to begin at the other end, i. e., if the rate is first to be fixed by facts wholly extraneous to the business of the taxpayer, it is submitted that the resulting burden of the tax should be

borne by the public treasury, and not by a relatively small group of citizens. "Taxes" this Court has well said "are very real things and statutes imposing them are estimated by practical results." *Nichols v. Coolidge*, 274 U. S. 531, 541 (1927).

For the reasons thus briefly summarized under the four foregoing captions we contend that the enactment of AAA was beyond the constitutional power of Congress. If the Court assents to this conclusion, a consideration of the questions of Delegation and Ratification becomes unnecessary. If, however, the Court desires to consider the questions last-mentioned, the following discussion is respectfully submitted:

V.

THE ACT INVOLVES AN INVALID DELEGATION OF POWER TO THE SECRETARY OF AGRICULTURE.

The Government's argument on this point is an ingenious attempt at over-simplification. It would suggest that the sole function of the Secretary of Agriculture is to find certain readily ascertainable objective facts, and that the imposition of the processing tax upon certain definite commodities automatically follows. Such an argument requires a brief re-examination of the lengthy provisions of the statute on this subject.

(A) Discretion to determine what is to be taxed and when the tax is to become effective.

The taxing provisions are to be found in Section 9 of the statute. This permits the taxation of "any basic agricultural commodity". The latter term is defined in Section 11, which lists specific commodities (including hogs). The list, however, is in fact an illusory one, because by Section 15(d) the Secretary is empowered to impose a compensat-

ing tax on any "competing commodity", and the determination of "competition" is left to him, the phrase not being defined in the Act. The class of possible taxable objects is therefore wholly indefinite. In this respect, petitioner can hardly argue that Congress itself has defined the scope of action.

But even if we confine ourselves to the list of products given in Section 11, nothing in the statute ordains in mandatory language that any specific commodity shall be taxed. Power to select the objects of taxation from among those enumerated is conferred directly on the Secretary of Agriculture in the form of an authorization to determine the commodities with respect to which rental or benefit payments are to be made. The tax is imposed at the beginning of the marketing year immediately following a proclamation by the Secretary that payments will be made with respect to any commodity. Consequently we next turn to Section 8, which makes provision for such payments, to determine whether Congress has declared a policy, set up standards of action, or required findings in regard to those payments. We submit that it has not.

Before direct consideration of Section 8, it is important to note that the Act introduces another dispensation. We have said that the tax becomes effective when benefit payments are made. This is also an illusory provision, because under the terms of Section 15(a) the Secretary may, in the exercise of his judgment, suspend the imposition of the processing tax upon any commodity or any product therefor, and may even direct a refund of the tax paid. The tax is therefore not an invariable concomitant of benefit payments, and this fact destroys any argument that the former automatically goes into effect upon the determination of the latter. Let us assume for the moment, however, that the two are inseparable.

Section 8 declares that the Secretary "shall have power", in order to effectuate the declared policy of the Act, to arrange for a reduction in the acreage or produc-

tion for market of any basic agricultural commodity, and in connection therewith to make rental or benefit payments "in such amounts as the Secretary deems fair and reasonable." It will be seen that the initiation of a crop-reduction program by the Secretary is no more mandatory than is the prohibition of the transportation of petroleum in interstate commerce under Section 9(c) of the National Recovery Act: (*Panama Refining Co. v. Ryan,* 293 U. S. 388). Section 8 by itself plainly declares no policy. It places no limits upon the power of the Secretary in respect to either contracts or payments. There is no limit set as to the reduction for which he is willing to contract, nor as to the financial obligation he is willing to incur. He may act or not—as he chooses—unless a standard may be found in the introductory phrase "in order to effectuate the declared policy".

The best proof that Section 8 is purely permissive is contained in Section 11. This provides, in substance, that the Secretary may *exclude* from the operation of the provisions of the Act during any period any basic commodity or any class, type or grade thereof, if he finds that the Act cannot be effectively administered to the end of "effectuating the declared policy" with respect to such commodity or classes thereof. This section nullifies any argument that the word "power" is the equivalent of "duty".

What is the net result of these provisions? It is clear that each supposedly mandatory provision is nullified by another provision elsewhere in the Act. For each injunction there is a corresponding dispensation. Thus, the Secretary is to make rental or benefit payments in connection with reduction contracts; but he need not do so if he decides otherwise. A tax is to go into effect when rental or benefit payments are made; but the Secretary may forgive such a tax. The tax is to apply to certain specified commodities; but the Secretary may add to the list of taxable objects at his will. The sole guide to his action is the effectuation of "the declared policy of the Act".

This brings us to a consideration of the "Declaration of Policy", contained in Section 2 of the Act. As has been pointed out, all action by the Secretary is referable to this section, because there is no other limitation upon his conduct. What standards of action does this section establish? The section is divided into three paragraphs. The first states it to be the legislative policy "to establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor" as will increase the purchasing power of farmers by raising the prices to a level which prevailed during a specific five-year base period prior to the war. The second paragraph provides that this parity shall be approached gradually, in view of the current consumptive demand in domestic and foreign markets. The third paragraph specifies that the consumers' interest must be protected by readjusting farm production at such a level "as will not increase the percentage of the consumers' retail expenditures for agricultural commodities or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period."

We do not quarrel with the assertion that the statement of policy is explicit in so far as it seeks to insure to the farmer a certain level of purchasing power. The vice of the Act, however, lies in the fact that there are no limitations whatever upon the methods to be used by the Secretary in reaching the goal desired. Congress has defined the objective, but has given the Secretary a free hand in reaching that objective. It has not declared that production in the case of any commodity is to be restricted to a fixed figure. It has not even declared that production shall be balanced with consumption—a determination that might be made with reasonable accuracy. The limitation in the second paragraph of Section 2 that parity shall be approached "gradually", obviously does not place any intelligible limitations upon the conduct of the Secretary, and in fact is at

variance both with the Declared Policy of the first paragraph and also with the actual practice of the Adjustment Administration. When Sections 2 and 8 are read together, the restrictions are found to be illusory; the extent of action is purely discretionary; the standards are the mere judgment of the Secretary. It is true that he is to make a determination that rental or benefit payments are to be inaugurated, but this is merely his judgment that the appropriate time has come to begin such payments, and in forming that judgment his discretion is absolute and uncontrolled. He is not required to begin such payments at any particular time, or upon the happening of any specified conditions. His judgment is not based upon or controlled by the ascertainment of any existing facts. Indeed, the only actual fact which he can determine is that the price of any given commodity is less than the fair exchange value thereof. Having made such a determination, however, his further actions in relief of that condition are entirely discretionary. In this respect the Act is to be contrasted with the Flexible Tariff Act. Under the latter measure, when the President found a discrepancy between the production cost of domestic and foreign goods, it became his duty to levy such a tax as would equalize such costs, but the President was not given free rein to determine what measures generally he should adopt to accomplish the desired end.

Even if we concede to the Secretary the utmost sincerity, he must guess blindly at the effect of his actions. He must consider such intangible factors as the cooperation of the farmer, the vagaries of the elements, and the resistance of the consumer market. All of these factors are not existing facts, but prophecies of the future. Nor is there any necessary relation between the imposition of the tax and his determination that rental or benefit payments are to begin. He may make the determination, put the tax into effect, and use the money for open market or surplus buying, carrying on the benefit feature as a matter of form only. It seems perfectly clear that the generating event

which calls this tax into being is a mental operation of the Secretary, which is not a fact finding, but a pure exercise of discretion as to whether and to what extent or by what means it is advisable to carry out the general policy of the Act. What Congress in effect has said to the Secretary is this: "We wish to reach and maintain a certain constant level of purchasing power for the farmer. We give you blanket power to raise money for that purpose. It is unnecessary for us to *compel* the farmer to reduce production, because we give you the power to make contracts with him and we put no limit upon the money you can hand out to him. We know from our knowledge of human nature that you will have no difficulty in persuading a farmer not to raise crops if you pay him high enough for that privilege. By levying the tax, by making contracts, by rigging the market and making purchases on your own account, somehow you should be able to attain the desired result. You are left free to exercise in your own discretion, all or none of the many powers granted to you."

Petitioner argues that once the Secretary finds farm price to be below parity price, it is his duty (not his option) to inaugurate a reduction program; and further, that the taxpayer cannot question the discretion exercised in planning such a program, because the tax goes into effect when *any* reduction takes place. This proposition sounds plausible until it is analyzed with reference to a particular commodity. A concrete example is milk, which was specifically included in the list of the original basic commodities. Although dairy production was at a volume above market requirements, no production-control program has as yet been put into effect. According to "Agricultural Adjustment in 1934" (a Report of Administration of the Agricultural Adjustment Act February 15, 1934, to December 31, 1934), "A dairy-adjustment program was presented to producers, but the support it received from the dairy industry was not deemed sufficient to warrant its adoption." (p. 5) The Report further indicates (pp. 132, 133) that while farmers

were about equally divided in numbers between those in favor and those opposed to all or parts of a suggested reduction program, it was deemed inadvisable to put the program into effect until a substantial majority of the producers desired it. Petitioner states (p. 72 of its brief) that a decrease of production would mean a decrease of the total domestic supply and this in turn would of necessity tend to raise domestic prices. The conclusion is drawn from this premise that the determination of the Secretary to initiate a reduction program did not involve any application of judgment. If the proposition is as simple as this, then the question immediately arises why no reduction program was initiated in the case of milk. It is true, of course, that if only fifty per cent. of the dairy farmers desired such a program, it would not have been as effective as if a substantial majority had desired it. Since, however, petitioner claims that it was mandatory upon the Secretary to act to increase the price to a desired level, the question immediately arises why such action was not taken in the case of milk in order that partial results at least might be accomplished.

The same situation exists in respect to cattle, which were added as a basic agricultural commodity on April 7, 1934.* No rental or benefit payments have been made with respect to this commodity, although the Government has embarked on an elaborate cattle-purchase program; and no processing tax has been put into effect.

These two commodities are cited as examples of the extraordinary discretion vested in the Secretary of Agriculture by the Act. They indicate that the problem is not as simple as petitioner would have this Court believe it. The Secretary does not merely determine if farm price is less than parity price, and if so automatically embark upon a system of rental or benefit payments. The problem is highly complicated by many factors which result in leaving the

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*Jones-Connally Cattle Act, Public No. 142, 73d Congress, 48 Stat. 528.

imposition of the tax upon the citizen wholly within the Secretary's judgment.

It may be here noted that even were such a policy declared in terms sufficient to give an intelligent guide, the Secretary might with impunity ignore that policy, because Section 8 contains no requirement that findings of fact shall be made; and we take it that the usual statement in the orders of the Secretary declaring the necessity of a reduction program in the case of a particular commodity, to the effect that the program is entered into in order to effectuate the declared policy of the Act, is not a finding of fact but a mere conclusion. Such a statement does not set forth the facts upon which the conclusion is based, with the result that the conclusion cannot be tested in the light of any policy. The proclamation of the Secretary with respect to hogs is given in the footnote.* The absence of any requirement for findings of fact is another reason why the delegation of power is improper: see *Panama Refining Co. v. Ryan,* supra, at page 431.

We have mentioned the consumer, although there is no evidence of any effort to comply with the "standards" of the third paragraph of Section 2. No findings, so far as the records show, have been made to meet that test. On the other hand, history is eloquent as to the reduction in consumer demand. It is a fair statement to make to say that the interests of the consumer have been steadily ignored in the attempt to reach the ideal of the pre-war period. The Secretary may, however, have had some justification for ignoring the consumers' interests, for an examination of

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*"I, Henry A. Wallace, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, have determined and hereby proclaim that benefit payments are to be made with respect to hogs, a basic agricultural commodity.

In testimony whereof I have hereunto set my hand and caused the official seal of the Department of Agriculture to be affixed in the City of Washington this 17th day of August, 1933.

(Signed) H. A. Wallace,
Secretary of Agriculture."

the body of the Act shows that there are no detailed provisions to guide him in guarding the consumers' interests. It is quite conceivable that the third paragraph of Section 2, thoroughly inconsistent with the other objectives of the Act, was inserted merely as a polite gesture to the public, without sincerity of purpose.

One further contention of the petitioner on this subject requires brief consideration. This contention may be stated as follows: The Secretary is given discretion only with respect to rental or benefit payments; the expenditure of public funds in such a manner is an executive and not a legislative function; therefore the imposition of processing taxes contingent upon the exercise of such a specified executive function involves no delegation of legislative power. The fallacy of such an argument lies, of course, in the fact that the question here is not directly that of the expenditure of public money, but is the very serious and fundamental question of the imposition of a tax. It is one thing to say that the executive may have wide discretion in distributing an appropriation. It is quite another thing to claim that the exercise of such discretion may be made the basis for the levying of a tax. In fact, the argument defeats itself. It will not be denied that the power to raise taxes is a legislative power. To say that this legislative power can be hitched onto executive discretion as to the expenditure of funds, like a tail to a kite, is to put the most extreme case of delegation possible. As was said in the *Panama Refining* case, supra (p. 432):

> "We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action."

On the contrary, we are dealing with the taking of money from the taxpayer's pocket, which in its effect upon him is equally as serious as the creation of the crime of

transporting "hot oil". Consequently, it will not do to justify an unwarranted delegation of taxing power by coupling the tax with discretionary action admitted to be unlimited in its scope.

(B) Discretion to Determine the Rate of Tax.

The act provides that farm price and fair exchange value are to be ascertained from available statistics of the Department of Agriculture. Petitioner's brief stresses at length the fact that these statistics are known and identified. We do not quarrel with this fact. We readily agree that the act refers to official statistics which have been for a number of years issued by the Department. We do insist, however, that when the formula is examined it is found to have no mathematical basis whatsoever. Reduced to their lowest terms, the two factors entering into the formula (farm price and fair exchange value) are based upon the unchecked answers of casual correspondence of the Department throughout the country, weighted first by states and then weighted again by reference to a family budget. We seriously question whether the tax burden of the citizen should be based upon such statistics.

The propriety of the use of these statistics, however, becomes an academic question, in view of the fact that in the case of certain commodities the formula has not, in any real sense, been taken as the determinant of the rate of tax. It is true that the act specifies the formula in the first instance: The rate is to be the difference between the fair exchange value of the commodity and the actual current farm price thereof. Two later provisions of the act, however, permit a complete departure from the basic rate. In the first place, section 9(a) provides that "The rate so determined (i. e. by reference to the formula) shall, at such intervals as the Secretary finds necessary to effectuate the declared policy be adjusted by him to conform to such requirements." In the second place, section 9 (b) gives leave to the Secretary to determine whether the tax at the formula

rate, on the processing of the commodity generally or for any particular use or uses, will cause such a reduction in the quantity of the commodity or products thereof domestically consumed as to result in an accumulation of surplus stocks or in the depreciation of the farm price. If he finds that such a result will occur, he may then put the tax "at such rate as will prevent such accumulation of surplus stocks and depreciation of the farm price and the commodity".

The petitioner contends that the cotton processor cannot question these provisions because the rate of the tax on cotton has not been adjusted. The processors of hogs, however, (on behalf of a number of whom this brief is filed) certainly do not fall into this category, in view of the determination of the tax on that commodity.

The processing tax on hogs was first imposed by the Secretary in Regulations issued October 18, 1933 (Hog Regulations, Series 1). These prescribed that a tax should go into effect as of November 5, 1933. For the month of October, however, the fair exchange value of hogs determined in accordance with the Department statistics was $8.38, while the current average farm price was only $4.17. It is obvious that the formula bore no practical relation to any tax that might have been imposed, since the resulting tax of $4.21 would have been greater than the farm price itself. By the Regulations the Secretary prescribed that as of November 5, 1933, the tax should be 50 cents per cwt.; as of December 1, 1933, $1.00 per cwt.; as of January 1, 1934, $1.50 per cwt.; and as of February 1, 1934, $2.00 per cwt.

On December 21, 1933, the Secretary issued Hog Regulations, Series 1, Revision 1, in which he stated that an adjustment of the rate of tax was necessary, and accordingly fixed it as follows: as of January 1, 1934, $1.00; as of February 1, 1934, $1.50; as of March 1, 1934, $2.25. The rate has remained at $2.25 since the latter date. As has been noted, when the tax was first imposed, this sum was prac-

tically one-half the maximum rate. By December 1934, however, the farm price of hogs had risen so high that the rate of $2.25 actually exceeded the formula rate; and it has remained in excess of the formula rate continuously since that date. Indeed, in January 1935, the tax based upon the formula would have been but 81 cents.*

On first impression, a reading of the act would suggest that the formula rate would go into effect initially and then be adjusted from time to time on the basis of actual past experience. Actually the various provisions taken together allow the Secretary to ignore the formula entirely. This is exactly what was done in the case of hogs. *The original formula rate has never been put into effect, either at the inception of the tax or at any other time.* In the first instance, the Secretary prescribed rates which would take effect at various months in the future—a determination that must necessarily have been based upon opinion and not upon existing facts. In December 1933, a second adjustment was made, operative again as to future months, and raising the ultimate tax by 75 cents. If such an adjustment is contemplated by the provisions of the act, it denotes an extraordinary breadth of discretion. Finally, when operations of the scheme had become so successful that the farm price had exactly doubled, the Secretary did nothing to readjust the tax to conform with the formula—a course of conduct which can only be explained by assuming that the sole reason for levying the tax is to have funds in hand to pay the farmer as high a premium as possible.

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*The actual statistics for the first six months of 1935, as computed by the Department of Agriculture, are as follows:

1935	Index of Articles Farmers Buy	Fair Exchange Value of Hogs	Current Average Farm Price of Hogs	Difference	Rate of Tax
Jan.	126	9.10	6.87	2.23	2.25
Feb.	127	9.17	7.10	2.07	2.25
March	127	9.17	8.10	1.07	2.25
April	128	9.24	7.88	1.36	2.25
May	128	9.24	7.92	1.32	2.25
June	127	9.17	8.36	.81	2.25

Obviously, on this showing the Secretary cannot plead that the determination of the rate is a mere exercise of mathematics. He is in this dilemma: If the formula states a limit, it is one which has no real application to the case and leaves the Secretary free to decide the amount of tax at will. If, on the other hand, the formula is merely another meaningless provision, then for the first time a Cabinet officer has been given power to levy a tax at whatever rate he pleases, without limit or restriction. It is difficult to conceive of a more complete surrender of legislative power. The argument that a readjustment of the rate downward is not to be made in the case of mere temporary fluctuations can hardly stand, in view of the fact that the rate has exceeded the formula through the whole of the past year. If, however, the formula is not to control, then the contention that the Secretary is merely performing an administrative function loses all of its significance.

We submit this analysis of the Act compels the conclusion that the delegation of power to the Secretary of Agriculture is wholly unwarranted under our scheme of government. Petitioner has attempted to bring the Act within the category of those cases where the statute was one designed to take effect in the future upon certain conditions not within the control of either Congress or the executive, and where it was essential to its purpose that it should become effective without delay upon the happening of such contingencies; in which case it was held permissible to delegate to the executive the power to say whether those events had occurred, always, however, upon an informed fact-finding. When the scope of the Secretary's authority is examined, it will be found to bear no real relation to such a situation. A comparison with the familiar case of *Hampton v. United States,* 276 U. S. 394, is instructive on this point. The *Hampton* case involved the provisions of the Flexible

Tariff Act. This Act gave to the President the power to increase or decrease duties on imported articles to equalize the differences in cost of production of those articles in the United States and in foreign countries. The Act specifically listed the subjects of taxation. It fixed the basic rate in dollars and cents. It limited a change in rate to the extent of fifty per cent. The determination of a change was based upon existing facts, and not upon guesses as to the future. The facts were to be found by the Tariff Commission, and the President was *required* (*not permitted*) to act on those findings and declare the new rate to be in effect after a specified waiting period. The Congress, furthermore, was exercising its undoubted and unlimited power over articles concededly in foreign commerce.

In contrast, the Agricultural Adjustment Act, stripped of empty words, guarantees that the making of contracts, the expenditure of money, the choice of the subjects of taxation, and the determination of the amount and time of taxation, are left wholly to the unfettered judgment of the Secretary. He can make contracts or not, spend what he pleases, tax any class of processors whom he wants and when he wants, and justify each successive step by the statement of opinion that in his judgment "it will effectuate the declared policy of the Act." The point bears repetition that his various functions cannot be isolated. We are not here dealing with mere executive action, but with executive discretion which in fact terminates in the imposition of a tax; and it is of this tax the processors complain.

Even more serious, however, is the actual situation that in reality it is not the Secretary who determines to impose the tax, but the farmers themselves. Whether or not adjustment programs are to be put into effect is in practice made dependent upon a vote of the producers. A concrete illustration is the case of hogs: The method of taking the farmers' vote is outlined in "Corn-Hog Adjustment (A Handbook For Use in the Corn-Hog Adjustment Program)", issued by the Agricultural Adjustment Adminis-

tration in January of 1935. The relevant extracts are placed in an appendix to this brief. Under the system invoked, a series of six regional meetings were held throughout the country, at which representatives of the Administration discussed the advisability of a corn-hog program for 1935. The vote of the meetings was taken, and recommendations made. It was then proposed that a direct referendum be taken among all the corn-hog producers on the question of the 1935 program. As the pamphlet indicates, "It was generally agreed that the Administration should undertake no new action unless a clear majority of farmers favored such action." The referendum actually took place during the first two weeks in October, the producers being asked to vote on two questions: First, whether they favored any adjustment program dealing with corn and hogs in 1935; and second, whether they favored a "one contract" adjustment program dealing with grains and live stock, to become effective in 1936. A majority of the votes cast being in the affirmative, the 1935 program was therefore initiated.

Exactly the same procedure was carried out for the year 1936. In October, 1935, the Administration issued Commodity Information Series, Corn-Hog Leaflet No. 1. This pamphlet is also included in the appendix. Examination will show that it places the continuance of the program squarely in the hands of the farmer. It commences, "Shall corn-hog adjustment continue?—Producers will decide!" It concludes, "Whether a production-control program for corn and hogs will be continued rests with the farmers themselves, and will be determined by their votes in the corn-hog referendum to be held this month on the following question:

DO YOU FAVOR A CORN-HOG ADJUSTMENT PROGRAM TO FOLLOW THE 1935 PROGRAM WHICH EXPIRES NOVEMBER 30, 1935?" (Italics theirs.)

The same course has been followed in the case of other commodities. Generally the vote has been favorable, and

a reduction program has been instituted. As has already been noted, in the case of milk the dairy farmers were about equally divided in their sentiment, with the result that no milk program was put into effect. In the case of cotton, the Bankhead Cotton Control Act specifically requires that a vote of the farmers be taken to determine if quotas are to be instituted.

It may be the Secretary acts properly in polling the sentiment of the farmers upon these subjects under the broad grant of power under the Act. In fact the brief of petitioner acknowledges this fact (see page 76). Recognition of the fact, however, effectively nullifies any argument by the petitioner that the Secretary is merely acting in a ministerial capacity, and that the imposition of the tax involves no exercise of legislative discretion. In fact, it means not only that power has been delegated to the Secretary to impose the tax, but also that he in turn may delegate this power to the farmer. In other words, the farmer decides whether a tax shall be levied upon a certain class for his own benefit. Since it can hardly be argued that any standards are laid down to control the farmer's action, except the needs of his own pocketbook, the Act now appears in its true light as an unlimited and uncontrolled grant of power.

It will of course not do to say that the farmer merely decides he will limit his production. If, as petitioner itself contends, the tax automatically goes into effect upon the making of benefit payments, the farmer in substance decides that a tax will be laid. We submit that such a delegation of power goes beyond any conceivable grounds of constitutional, or for that matter even extra-constitutional, government.

VI.

THE ATTEMPTED RATIFICATION OF THE TAXES BY THE 1935 AMENDMENTS IS INEFFECTIVE.

The brief filed on behalf of respondents ably discusses this proposition and effectively disposes of the various authorities cited by the petitioner. We therefore content ourselves with the following observations, which we consider fundamental.

First: In any event Congress cannot ratify what it could not have done itself. Improper delegation of power is not the only infirmity urged against the tax. Consequently, if the tax be held invalid on any ground other than invalid delegation, ratification cannot give it life.

Second: The ratification cannot be sustained as a retroactive tax. It does not purport to be such; indeed the Amendments expressly state that their provisions do not impute illegality to any earlier acts of the Secretary. Nor could a retroactive excise thus be imposed under the due process clause, if the tax be now laid for the first time.

Third: Viewed as an attempted ratification, the action is equally ineffective. This is not

(a) A case of a curative statute aimed to remedy defects and mistakes in the administration of a law, where Congress has admittedly legislated upon the subject in the first instance; nor

(b) A case involving the administration of our insular possessions, to which the Constitution in this regard does not apply, and where Congress *can* admittedly delegate legislative power to executive officials.

On the contrary, this is a case where by assumption, Congress is required by the Constitution to legislate, but where it has delegated that function to another. The problem is entirely novel, but the answer is clear. The people have a right to be governed by their elected representatives, and not by another. If another legislates and Congress assembles merely to rubberstamp his acts, Congress commits a fraud upon the powers entrusted to it. The people have no assurance that the legislative mind has functioned. Their equity lies in the fact that it is they who have delegated the power, and they may insist upon its proper exercise.

FOURTH: The Amendments to the Act make it clear that Congress is embarking upon a deliberate scheme of government by ratification. We have (a) an original unlawful delegation of power; (b) a ratification of acts done thereunder, and (c) an extension and expansion of the same powers for the future. This can only mean that future ratifications and future delegations are contemplated. If this be the case, all pretense of Congressional legislation can be abandoned. Each Department, under an omnibus grant of authority, can write its own laws, and at strategic intervals have Congress say, "that is exactly what we would have done in your place". Surely, the people are, under our present Constitution, entitled to protection from the continental form of government which this system now seeks to introduce.

For the reasons herein briefly stated, it is respectfully submitted that the Agricultural Adjustment Act, and more particularly the processing taxes levied thereunder, should be declared invalid; and that the decree of the court below should therefore be affirmed.

WM. B. BODINE,
Attorney for Amici Curiae.

APPENDIX "A".

Excerpt from "Corn-Hog Adjustment—A Handbook for Use in the Corn-Hog Adjustment Program". (pp. 10-16).

(Published by Dep't. of Agriculture, Jan. 1935.)

Regional Meetings Held.

A series of six regional meetings was held in early September at Kansas City, Indianapolis, St. Paul, Salt Lake City, Atlanta, and New York City. Representatives of the Agricultural Adjustment Administration discussed the economic outlook for 1935, with State corn-hog committeemen, extension workers, and others. The advisability of devising a corn-hog program to prevent a new cycle of surplus and price collapse was considered.

By an almost unanimous vote, the State groups favored a 1935 corn-hog program. Each meeting recommended certain provisions. In general, these recommendations favored:

(1) A somewhat smaller adjustment below the base production average, in the cases of both corn and hogs.

(2) Smaller total payments on both corn and hogs.

(3) More liberal authorization for use of the acres shifted from corn production.

(4) More flexibility in administrative rulings; and

(5) Redetermination of hog and corn bases in instances where it was justified by examination of the producer's data.

At these regional meetings, the Administration proposed a direct referendum among all corn-hog producers on the question of developing and offering a new program for 1935. It was generally agreed that the Administration

should undertake no new program unless a clear majority of farmers favored such action.

A direct referendum, obviously, was the best means of ascertaining the wishes of producers themselves, but on the other hand there was the problem of time and personnel for holding the many local meetings necessary for adequate presentation of outlook information and for taking the votes. In spite of the newness and magnitude of the referendum project, however, the majority of corn-hog committeemen and extension workers declared it could be carried out promptly. Therefore, they favored it. The referendum, it was decided, should also include a vote as to whether farmers favored a general one-contract adjustment program to become effective in 1936.

The Referendum.

Accordingly, the first two weeks in October were set aside for the referendum. Except in areas where corn-hog contract signers were few and widely scattered, community meetings were called. The total number of meetings, representing all States, exceeded 16,000. The outlook information was discussed. Then a secret written ballot was taken. Two questions were voted on:

(1) Do you favor an adjustment program dealing with corn and hogs in 1935?

(2) Do you favor a one-contract-per-farm adjustment program dealing with grains and livestock to become effective in 1936?

With respect to Question No. 1, it was explained that the corn-hog program for 1935, if and when finally developed, probably would follow the general plan of the 1934 program. The percentage of adjustment from the 1932-33 base production would not be greater in 1935 than that required in the 1934 program and might be less. Benefits

payments would not be the same as they were in 1934; that is, corn benefits probably would be somewhat larger and hog benefits materially less than in 1934.

With respect to Question No. 2, it was explained that a one-contract-per-farm program would involve the six grain crops named as "basic" in the Agricultural Adjustment Act—wheat, barley, rye, corn, grain sorghums, and flax. Such a plan would represent a shift from several single-crop contracts to a broad program of developing better systems of farming through less intensive use of the land, conservation of soil resources, and use of the land for production of those crops for which it is best adapted. The plan would seek to provide the desired degree of control over the combined acreage of the several crops involved, and yet flexibility enough to permit to cooperating farmers all the freedom of action consistent with maintaining the proper balance between production and effective demand. Such a program would be financed by processing taxes on grains and livestock and might or might not include direct control of livestock.

Results of the Voting.

The referendum was practically completed, as scheduled, by the middle of October. The final results as tabulated from certified State reports showed that 374,584 contract signers, or 69.9 percent of the total number voting, had voted favorably on Question 1 and that 262,845 contract signers, or 52.9 percent, had voted favorably on Question 2. The 535,690 signers voting on Question 1, represented more than 46 percent of all 1934 contract signers; the 496,433 signers voting on Question 2, represented nearly 43 percent of all 1934 signers. In many areas, the local corn-hog committeemen also took the vote of nonsigners present at the referendum meetings. For the entire country, about 44,026 nonsigners were polled on Question 1; of this number about one-third voted favorably. About

40,179 nonsigners were polled on Question 2; of this number slightly less than one-third voted favorably.

The percentage of corn-hog farmers voting in the referendum was considerably larger than had been expected. The participation compared favorably with the usual turnout at political elections, in spite of the fact that much Fall work was under way at the time of the poll. The results suggest some of the possibilities for building an economic democracy in this country. The 1934 corn-hog referendum represents the first opportunity ever given so large a group of American people to express their wishes directly and solely on an economic issue.

Work on Contract Begun.

Immediately after the votes were counted, a group of farm leaders and a number of State corn-hog committeemen from the leading corn and hog producing States reviewed the referendum results with the Administration. They declared that the favorable majority of more than two-thirds of the large number voting warranted the immediate development of a new program for 1935. Shortly thereafter the Administration, in collaboration with the State corn-hog representatives, began work on a new contract. Every effort was made to incorporate all practicable suggestions based on experience in 1934 and to make the program simpler and more flexible.

On November 15, the terms of the contract were announced. The necessary administrative rulings relating to the new contract and the numerous forms, such as transmittal sheets and work sheets, were prepared next. By mid-December, all of the material pertaining to the new program had been developed.

A series of instructional meetings with State corn-hog committeemen and extension workers followed. These meetings were held during the week before Christmas in Kansas City, Minneapolis, Indianapolis, Salt Lake City,

New York City, and Atlanta. The State workers in turn arranged meetings with county workers where the means and procedure for handling the 1935 program could be explained. Finally, plans were made for starting the contract sign-up.

APPENDIX "B".

Commodity Information Series Corn-Hog Leaflet No. 1

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
ISSUED OCTOBER 1935

Shall Corn-Hog Adjustment Continue?—Producers will decide!

Farmers are facing the question now whether a production-control program will be needed to follow the 1935 corn-hog program.

The 1935 crop year in the principal grain and livestock producing areas is drawing to a close.

The present corn-hog adjustment contract expires on November 30, 1935.

IMPROVED INCOME—MORE EQUITABLE PRICES

Substantial improvement has been made during the last two years in the economic situation of corn and hog farmers and in achieving the objectives of the Agricultural Adjustment Act.

Corn and hog prices and income to corn and hog producers have measurably increased over those of two years ago. In recent months, for the first time in nearly 10 years, corn and hog prices have been at or near the fair exchange values of these commodities. Despite the drought, cash-farm income from hogs in 1934, including adjustment pay-

ments, was 37 percent larger than the income in 1933 and nearly 60 percent greater than that of 1932.

AVERAGE FARM PRICES OF CORN AND HOGS DURING LAST THREE MARKETING SEASONS

[Year beginning Oct. 1 and ending Sept. 30]

Marketing year	Corn	Hogs
	Cents per bushel	*Dollars per 100 pounds*
1932-33	32	3.36
1933-34	52	3.73
1934-35	82	7.10

Farmers have learned that through the voluntary contract and processing tax method an effective producer organization can be achieved. They know that substantial benefits may be expected from such cooperation. The question now before corn-and-hog producers of the United States is whether they shall continue this cooperation to prevent the return of ruinously low prices.

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FEED SUPPLIES LARGE—LIVESTOCK POPULATION SMALL

What is the problem that farmers face today?

The 1934 drought hastened the elimination of both surplus livestock and feed. But out of it has developed a serious problem in maintaining a balance between feed-grain production and livestock numbers in 1936 and 1937.

The indicated production of corn in the United States for 1935, as of September 1, was 2,184,000,000 bushels, as compared with a production of only 1,377,000,000 bushels in 1934 and an average production of 2,562,000,000 bushels in the 5-year period 1928-32. The combined production of all feed grains for 1935 is expected to be only about 10 percent under the 5-year average and about 75 percent greater than the extremely short crop of 1934. In addition, the in-

dicated production of hay for 1935 is about 87 million tons, as compared with a 5-year average production of 80 million tons.

As a result, there is enough grain and hay available to provide an adequate supply of feed for almost the same number of livestock as were on farms in the period from 1928 to 1932.

But how many farm animals do we now have to consume these feed supplies?

Livestock numbers are far below the 1928-32 level. During 1934 the number of hogs dropped approximately 35 percent, and other livestock were reduced by from 5 percent to 11 percent. It is probable that because of the extreme shortage of feed grain and hay supplies during the past year the number of livestock on January 1, 1936, will be almost as small as the number at the beginning of 1935—which was the smallest in 34 years.

The grain supply per animal for the 1935-36 feeding season, therefore, undoubtedly will be larger than in any year since the World War, except 1926.

WHAT IS AHEAD?

The average farm price of corn in mid-September was approximately 75 cents per bushel or around 90 percent of parity.

A 20-percent increase in 1935 fall farrowings over 1934 was indicated in the June 1 pig-survey report. The 1935 fall pig crop, however, may be greater than the June forecast because of the relatively high level of hog prices now and a relatively large supply of feed grains in prospect. This would nearly offset the decline in the 1935 spring farrow.

The number of hogs slaughtered under Federal inspection during the market year ending September 30, 1936, therefore is likely to be only slightly less than the 30 mil-

lion head slaughtered during the 12-month period just closed. The total tonnage of pork produced will be about the same, for the hogs slaughtered unquestionably will be heavier because of increased feed supplies.

Though very little improvement in export demand can be expected during the coming year, a continuation of the gradual economic recovery which has been under way since 1933 seems in prospect. With total hog supplies unchanged, 1935-1936 hog prices may be expected to average about the same as in 1934-35, but appreciably lower than the seasonally high peak in August and September 1935. As increased hog supplies will be coming on the market during the last half of the 1935-36 season, a downward trend in hog prices is in prospect.

WITH NO ADJUSTMENT—HOW ABOUT 1936?

If there is no adjustment program in 1936, farmers will be likely to harvest more than 100 million acres of corn. (Average corn acreage 1932 and 1933 about 105½ million acres.) The September Crop Report indicated nearly 94 million acres of corn for harvest in 1935, even though contract signers retired about 11½ million acres from corn production. With average yields in 1936, an uncontrolled acreage of corn would result in a production of more than 2½ billion bushels. The supply of corn per grain-consuming animal, therefore, would continue at a very high level in the 1936-37 feeding season. It is extremely doubtful whether the total number of grain-consuming animals will be increased in 1936 enough to bring the grain supply per animal back to normal.

With no adjustment program, then, the farm price of the 1936 corn crop, in view of the relation between grain supplies and livestock numbers, may be expected to average much less than the price of the 1935 crop.

The relatively large supply of grain per head of livestock this winter and the accompanying hog-corn price ratio will be very favorable to increased farrowings in

1936, especially next spring. It is expected that the number of pigs farrowed in 1936 will average from 25 to 30 percent higher than in 1935.

If this increase in hog numbers is realized, the downward trend of hog prices is expected to continue throughout the 1936-37 marketing season.

WITH NO ADJUSTMENT—HOW ABOUT 1937?

Corn and hog producers realize the necessity of looking ahead more than one year in determining their farming operations.

Without an adjustment program to follow that of 1935, the stage will be set for another major upswing in hog production, beginning this fall and reaching its peak in 1938. If the feed situation and the price of hogs in relation to the price of corn are as favorable as present conditions indicate—assuming no 1936 program is decided upon—another increase of 25 to 30 percent in the number of pigs farrowed in 1937 may be expected. This would mean a 1937 pig crop 50 to 70 percent larger than the 1935 crop.

A considerable increase in hog production is desirable from the stand point of both farmers and consumers, since hog numbers were too drastically reduced by the drought. But an unlimited increase in hogs is not to the interest of either producers or consumers. An undue increase in hog numbers means lower prices, smaller incomes, and less buying power for corn and hog producers. When farm incomes fall, a huge market for industrial products is lost.

Farmers do not want to experience another painful production cycle—an uncontrolled upswing in production until farm prices hit bottom again and a subsequent, distressed liquidation until prices recover. These cycles have been major hazards to the hog industry for many years.

In this connection some previous rapid upswings in the hog cycle should be recalled. After the drought of 1894 the commercial slaughter of hogs increased over 40 percent from 1896 to 1898. Again, after the low point in hog mar-

ketings which was caused by liquidation of hog numbers during and immediately following the World War, the slaughter of hogs under Federal inspection increased nearly 40 percent from 1921 to 1923. Ten such production cycles have occurred since 1890, creating periodic market gluts and shortages and an almost continuous lack of balance between supplies and prices of corn and hogs.

Almost every factor in the present situation points to an even greater increase in hog production in the next three years from the 1935-36 level than in any previous period, that is, if farmers do not cooperate to control production.

FARMERS WILL MAKE DECISION

If the corn-hog adjustment program is to be continued, serious thought must be given now to the kind and degree of adjustment desired.

Farmers will make their choice now between:

(1) A program designed to hold corn production at a desirable level and to prevent an excessive increase in hog numbers, and

(2) Abandonment of the cooperative adjustment of both corn acreage and hog production, with the risk that the rapid increases in hog production and resulting low prices which have occurred in the past will be repeated.

Through the Production Control Associations and the Referenda which have been developed under the Agricultural Adjustment Act, farmers are now in position to speak for themselves more effectively than ever before and to obtain a higher degree of collective cooperation. In order to determine farmer opinion, meetings will be conducted in all corn- and hog-producing areas of the United States during October, at which the 1936 outlook will be discussed and an expression of opinion about the questions raised in this leaflet will be obtained.

Whether a production-control program for corn and hogs will be continued rests with the farmers themselves, and will be determined by their votes in the corn-hog referendum to be held this month on the following question:

Do You Favor A Corn-Hog Adjustment Program To Follow The 1935 Program Which Expires November 30, 1935?

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IN THE

Supreme Court of the United States

OCTOBER TERM 1935.

No. 401.

UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM M. BUTLER ET AL., Receivers of Hoosac Mills Corporation.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Brief Filed by Leo P. Harlow (Al. Philip Kane of Counsel) Amicus Curiae on Behalf of Farmers' Independence Council of America.

LEO P. HARLOW,
AL. PHILIP KANE, *of Counsel,*
Amicus Curiae, on behalf of
Farmers' Independence Council of America.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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FOREWORD.

This brief is filed on behalf of the Farmers' Independence Council of America. Herein we point out briefly the reasons for which we deem the Agricultural Adjustment Act (Ap-

proved May 12, 1935, Chapter 25, 48 Statutes 31) and the processing taxes invalid under the Constitution and unwise as an agricultural policy.

SUMMARY.

The argument may be summarized as follows: The purpose and effect of the Act is to reduce the supply and raise the prices of certain commodities. This is accomplished by means of buying the assent of farmers to a crop reduction program under such conditions that they will make more money currently by assenting than they will by retaining their right to individual judgment. It is also aided by a charge called a tax which is intended to close the gap between prices and a theoretical fair exchange value. Such a scheme deprives the states and the people of the control over private business which they reserved in the Tenth Amendment. The cases under the Commerce Clause support the contention that the powers exercised are beyond the powers of Congress. The taxes are levied for a purpose which is not public, but is substantially a taking from one class and giving to members of another; they are fixed upon an unreasonable basis; the control features are not necessary incidents to a tax law; in fact the taxes are such in name only; for these reasons they are invalid under the Fifth Amendment. The taxes cannot be justified under the general welfare clause unless these words are to be given such force as to wipe out much of the rest of the Constitution. The act is not in fact a measure for general welfare. Legislative power is improperly delegated to the Secretary of Agriculture to determine the control to be exercised over crops, to select commodities to be taxed, to fix the tax rate and to decide on its duration. This delegation of power is not necessary to the raising of revenue, but only to exert powers which Congress may not exercise. Such shifting of responsibility for legislation to an executive may not be done directly nor may it be done indirectly by ratification.

CONTROL UNDER THE AGRICULTURAL ADJUSTMENT ACT.

There is no need to enlarge upon the purpose of the Agricultural Adjustment Act and the taxes. Briefly, the purpose is declared in Section 2, to wit, to re-establish the purchasing power for certain commodities to that existing in the base period. The Secretary of Agriculture is authorized to lay a tax (Sec. 9) upon such basic agricultural commodities as he chooses to control (Sec. 8) in such amount that the tax will tend to equalize the difference between present purchasing power and purchasing power in 1909 to 1914 (Sec. 2). The amount first to be considered is the difference between "current farm prices" and "fair exchange value" (Sec. 9(b)) or it may be any other amount which will prevent accumulation of surplus and will tend to effectuate a declared policy of resurrecting purchasing power (Sec. 9(a) & 9(b)) to that which existed in 1909-1914. The Secretary is authorized to make exceptions (Sec. 11) or refunds (Sec. 15(a)) if the tax bears too heavily on any commodity. He may in his discretion tax competing commodities (Sec. 15(d)) in order to offset the disadvantages in competition caused by the tax. He may spend the proceeds of the taxes for expansion of markets, removal of surplus, rental or benefit payments, administrative expense, or refunds (Sec. 12). Rental or benefit payments are to be made to any farmer who will agree to reduce his production of a crop (Sec. 8), which the Secretary must control through agreements as a prerequisite to imposing the tax (Sec. 9). The agreements to reduce production are upon such terms as the Secretary wishes to make, the amount he pays is within his discretion (Sec. 8). The tax continues so long as the Secretary continues to control the crop (Sec. 9(a)) but no longer.

CONTROL THROUGH CROP REDUCTION CONTRACTS.

The cotton farmer who decides to participate in benefit payments must under the 1935 contract agree as follows:

1. Reduce the acreage to be planted to cotton in 1935 on the farm described in section III of this contract (hereinafter referred to as "this farm") by not less than twenty-five per cent (25%) and not more than thirty-five per cent (35%) below the base acreage[1] and hereby rents to the Secretary for 1935 an acreage of cotton land equal to not less than twenty-five per cent (25%) nor more than thirty-five per cent (35%) of the base acreage, as stated in item (d) of section IV. The acres hereby rented to the Secretary are referred to hereinafter as the "rented acres." All undertakings of the producer herein set forth are covenants which shall run with the land and shall bind all future purchasers, lessees, tenants, and encumbrances of this farm or any part thereof. The rented acres on this farm shall be posted in such manner as the Secretary or his authorized agent may direct.

2. Not grow cotton during 1935 on land owned, operated, or controlled by him unless such land is covered by a 1934 and 1935 Cotton Acreage Reduction Contract, except as provided in administrative rulings.

3. Not include in the rented acres waste, gullied, or eroded land. The rented acres shall be tillable land suited to the growing of cotton and shall represent in productivity a fair average of the cotton land on this farm.

4. Not increase in 1935 above 1933 or 1934, except as may be permitted under a contract between the producer and the Secretary, the acreage planted to peanuts, rice, tobacco, or wheat for sale.

5. Use the rented acres only for: Soil-improving crops; erosion-preventing crops; food crops for consumption on this farm; feed crops for the production

[1] The base acreage shall be determined as prescribed in Administrative Ruling No. 2, Cotton 106.

of livestock or livestock products for consumption or use on this farm; or fallowing; or such other uses as may be permitted by the Secretary or his authorized agent.

6. Permit access to this farm to any authorized agent of the Secretary and to any records, regardless of where located, pertaining to the production and/or sale of cotton on or from this farm and expressly waives any right to have such records kept confidential.

7. Endeavor in good faith to bring about the reduction of acreage contemplated in this contract in such a manner as to cause the least possible amount of labor, economic, and social disturbance, and to this end, insofar as possible, he shall effect the acreage reduction as nearly ratably as practicable among tenants on this farm; shall, insofar as possible, maintain on this farm the normal number of tenants and other employees; shall permit all tenants to continue in the occupancy of their houses on this farm, rent free, for the year 1935 (unless any such tenant shall so conduct himself as to become a nuisance or a menace to the welfare of the producer); during such year shall afford such tenants or employees, without cost, access for fuel to such woods land belonging to this farm as he may designate; shall permit such tenants the use of an adequate portion of the rented acres to grow food and feed crops for home consumption and for pasturage for domestically used livestock; and for such use of the rented acres shall permit the reasonable use of work animals and equipment in exchange for labor.

8. Nor sell, transfer, or assign, in whole or in part, this contract, or his right to or claim for payments under this contract, and shall not execute any power of attorney to collect such payments and any sale or assignment, order or power of attorney shall be null and void, except that the producer may pledge or hypothecate the rental payment due to him under this contract for the purpose of obtaining funds for carrying on the current operation of this farm and such pledge or hypothecation shall operate to establish an interest or right on the part of the pledgee in and to

said rental payment as against any other person or persons, but the pledge or hypothecation thereof shall not alter the provisions of paragraph 13 that rental checks drawn in compliance with this contract shall be made payable to the payee therein designated. If the rental payment herein provided for shall have been pledged by the producer and the payee herein designated notified of this pledge, then and in that event, such payee, whether he be the producer or another, shall receive the rental payment hereunder in trust for the benefit of the pledgee and shall be responsible to the pledgee therefor. The insertion of the name of any person as pledgee in paragraph 13 shall constitute a representation that a pledge has been made, to the person so designated, in conformity with the provisions of this paragraph for the purpose of obtaining funds (or credit) for carrying on the current operation of this farm in 1935 and for no other purpose.

9. Comply with the terms hereof and of all regulations or administrative rulings which have been or may hereafter be prescribed by the Secretary with reference to 1934 and 1935 Cotton Acreage Reduction Contracts, and any violation of said terms, regulations or rulings, or any material misstatement herein or in any information furnished by the producer, shall be grounds for the cancellation of this contract by the Secretary. In the event of such cancellation, the producer shall repay to the Secretary any sum(s) theretofore paid hereunder to the producers. The determination of the Secretary that any such violation or misstatement has occurred shall be final and conclusive.

Similar provisions are found in other crop reduction agreements. It cannot be more definitely stated than in the agreements themselves that a farmer who accepts federal money must part with the right to make his own decisions and be bound to do or not to do what has been or will be decided in Washington.

There can be no doubt that at the prices paid by the Secretary acreage has been reduced. The Consumer's Guide,

issued by the Consumers Counsel of the Agricultural Adjustment Administration, for September 16, 1935, estimates that in 1935 one in every twelve acres has been shifted to other crops or retired from production, a total of 30,000,000 acres in the United States; and that a greater acreage was affected in 1934.

The Secretary of Agriculture himself has evaluated the force of the control scheme in his 1934 Report at page 4: "In 1933 the cooperating cotton farmer growing 75 acres received about $1,707 for the lint. For the lint from 100 acres the non-cooperating farmer received only $1,663." . . . "In addition the cooperating farmers save on fertilizer, twine, and other expenses of production" . . . Failure to cooperate is an expensive luxury.

CONTROL THROUGH THE TAX.

At the same time the tax rate is operating to fix an artificial price for farm commodities. Such raising of prices cannot fail to restrict the demand. The farmer is thus made more dependent than ever on benefit payments not knowing whether or not the taxes have over shot the mark and reduced the demand more than production is reduced.

A farmer who has not signed an agreement may wish to use his land to produce a crop free from the restrictive powers of the government, but he will be unable to choose such a crop with any certainty, for at any moment a compensating tax may be levied under section 15(d) on the commodity he has chosen, or as has already happened several times Congress may discover that shifts are being made from a taxed crop to another crop and may provide for a crop reduction program for the new crop. Thus one who shifted from cotton to peanuts in 1933 found peanuts among the commodities subject to control under the Act of May 9, 1934. If he again shifted to potatoes, he found that the Act of August 24, 1935 included potatoes.

A farmer who has signed the crop reduction agreement

may find himself precluded from shifting to any other profitable crop and forced either to allow his land to be idle or to raise food and forage for use at home. If the land is left idle it may be subject to erosion or become infested with weeds. If it is planted to a crop to be ploughed under, expense and labor will be incurred without return. If planted to food and forage to be used on the farm, the balance of production is upset and those who have depended on selling similar food and forage crops find themselves with a reduced market and without government aid.

The scheme of control is such that continuation of any part of it must lead to eventual federal control of practically every agricultural activity.

FEDERAL CONTROL NOT CONSISTENT WITH A LIMITED FEDERAL GOVERNMENT.

Such control we submit is not in accordance with the limited federal government established by the constitution, wherein the powers of Congress are strictly defined and the balance of all powers are reserved to the States and the people.

U. S. v. *Cruikshank,* 92 U. S. 542.
Marbury v. *Madison,* 1 Cranch 137.
McCulloch v. *Maryland,* 4 Wheat. 316.
U. S. v. *Dewitt,* 9 Wall. 41.
Kansas v. *Colorado,* 206 U. S. 46.
Gibbons v. *Ogden,* 9 Wheat. 1.
Hammer v. *Dagenhart,* 247 U. S. 251.
Schechter v. *U. S.,* 295 U. S. 495.

Under the form of government heretofore defined the power to accomplish an end and the means to accomplish it must be found within the powers delegated to Congress before Congress may properly act. The control of farm operations, the imposition of "taxes" to raise prices, and the expenditure of tax money to carry into execution a scheme

for control of agriculture are all beyond any of the powers delegated to Congress by the Constitution.

In fact such purposes are very close to those which the people have reserved to themselves. *New State Ice Co.* v. *Liebmann,* 285 U. S. 262; *Fairmont Creamery* v. *Minnesota,* 274 U. S. 1. Such powers may be exercised by a *state* only under extraordinary circumstances. *Nebbia* v. *New York,* 291 U. S. 502.

Authorization for the passage of the Agricultural Adjustment Act cannot be based upon the statement by Congress in the Declaration of Emergency prefacing the Act that "conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest." The Act on its face is not an emergency measure and this court has already said of a similar situation in industry that "extraordinary conditions do not create or enlarge constitutional power." (*Schechter* v. *United States,* 295 U. S. 495.)

THE ACT EXCEEDS THE COMMERCE POWER.

The requisite authorization cannot be derived from the commerce clause. The production of agricultural commodities is entirely an intrastate operation, and is therefore subject to regulation, if at all, only by the several States. A declaration by Congress cannot make agriculture an interstate matter.

Kidd v. *Pearson,* 128 U. S. 1.
Crescent Cotton Oil Co. v. *Mississippi,* 257 U. S. 129.
Utah Light & Power Co. v. *Pfost,* 286 U. S. 165.
Chassaniol v. *City of Greenwood,* 291 U. S. 584.

The mere probability that a commodity will ultimately be sent to another State does not bring its production within interstate commerce, nor does such production directly affect or burden the stream of interstate commerce.

United Leather Workers v. *Herkert,* 265 U. S. 457.

Schechter v. *United States*, 295 U. S. 495, removed any doubts which might have existed about the applicability of the stream of commerce concept to this Act. Since the stream of commerce concept was there held inapplicable once the subject-matter had reached its destination, *a fortiori* such a concept does not apply to merchandise which has not yet sprung from the soil, nor to merchandise which has not yet entered interstate commerce. (See also *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330.)

Such intrastate affairs are beyond the control of Congress. As the court said in *United States* v. *Dewitt*, 9 Wall. 41:

> "That Congress has power to regulate commerce with foreign nations and among the several states and with the Indian tribes, the Constitution expressly declares. But this express grant of power has always been understood as limited by its terms; and as a virtual denial of any power to interfere with internal trade and business of the separate states; except indeed as a necessary and proper means for carrying into execution some other power expressly granted or vested."

THE ACT EXCEEDS THE TAXING POWER.

The tax is levied as a charge to adjust prices to a higher level (Sec. 9), and it is to be spent to reduce production and further increase prices. (Sec. 12.) It is collected from the industrial class. It is paid to members of the farming class who are willing to sell their right to private initiative. If it is permitted it could as well be levied and expended *mutatis mutandis*. It is clearly not poor relief for the test of the recipients is compliance rather than poverty. The benefit of a selected group or activity is not a proper public purpose under the Fifth Amendment for the taking or use of the property of any class of citizens.

Loan Association v. *Topeka*, 20 Wall. 655.
Railroad Retirement Board v. Alton, 295 U. S. 330.

Louisville Joint Stock v. *Radford*, 295 U. S. 555.
People v. *Salem*, 20 Mich. 452.

The tax may be entirely unreasonable in amount. It may be so great as to deprive a farmer of a market for what he raises. The only protection against such effects is the discretion of the Secretary of Agriculture. We believe we have already detected a shift of consumer demand from pork products to other products on account of the high prices in part, at least, caused by this Act. A tax must be upon a reasonable basis or it violates the Fifth Amendment.

Heiner v. *Donnan*, 285 U. S. 312.
Nichols v. *Coolidge*, 274 U. S. 531.
Hoeper v. *Tax Commission of Wisconsin*, 284 U. S. 206.

The tax is in purpose and effect a part of a control measure, starting with the control, figured so as to advance the control, continuing throughout the control, spent for control. It is an inseparable part of the attempt to raise prices which is the reason for existence of the Act. The other provisions of the Act are not calculated to preserve revenues but rather to destroy them by reducing the supply of the thing taxed. The control features are in no way incidental to the tax, for the tax is incidental to the regulation. Where it clearly appears that from the Act itself that its purpose is something beyond the power of Congress the garments of taxation lend it no authority.

Hill v. *Wallace*, 259 U. S. 44.
Bailey v. *Drexel Furniture Co.*, 259 U. S. 20.

See also *Magnano* v. *Hamilton*, 292 U. S. 40.

Any other principle would permit Congress at will to disregard the bill of rights and all its limitations and legislate in any field, even to the point of effecting a substantial change in the form of government.

The General Welfare Clause Does Not Extend the Legislative Power of Congress.

No authority for the control here exercised is found in the general welfare clause, unless indeed the clause is to be made the means of undoing the Constitution.

Under the theory advanced by Madison in the light of his intimate connection with drawing and expounding the Constitution, which we submit is the correct one, the power of Congress to lay and apply taxes is limited to the enumerated powers. If that theory is followed it is clear that the powers exercised in this Act were not granted to Congress.

The theory later proposed by Hamilton in his Report on Manufacturers leads to an anomalous result, for thereunder, if carried to the extreme advanced by the petitioner, Congress would have the power to tax one group and with the proceeds carry into effect any scheme to control any person or group of persons, in spite of the clear provisions of the Fifth and Tenth Amendments. But Hamilton himself in his famous Report admits that there is still a limitation contained in this clause such that Congress may raise and apply taxes only for purposes which are general and not local. Monroe, frequently quoted as supporting the Hamiltonian theory, in the message on the Cumberland Road Bill clearly indicated that however broad the power to appropriate, still it did not carry with it the power to legislate or carry a scheme into execution beyond the granted powers.

Even under the Hamiltonian theory, no authority is found for this Act, for its effect is limited to selected members of a class in one particular means of livelihood. It is not general in application. It is an attempt to do exactly what Monroe said could not be done, an attempt to carry into execution by force of the appropriating power a scheme of regulation beyond the enumerated powers of Congress.

Decisions of this Court support the proposition that this Act goes beyond any powers which may be read into the words "general welfare."

In *Nebbia* v. *United States,* 291 U. S. 502 at page 524 the power of the United States to promote the general welware is discussed and it is there stated that the national power is limited to matters committed to the United States by the Constitution, the States reserving all power to promote the general welfare touching all subjects not surrendered to the federal government.

In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, declaring invalid a moratorium provided for farm mortgages, this Court refused to consider arguments that such a provision could be justified as a measure to promote the general welfare, and limited its consideration to the effect of the Fifth Amendment. In reaching the conclusion to reject such arguments the court must necessarily have determined that the general welfare clause grants no powers in excess of the limitations of the Fifth Amendment.

Upon the principle that the means selected by Congress must bear a reasonable relation to a legitimate end (*Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347, note 5) the question may be raised whether or not this Act is in fact for the general welfare.

At a time of unemployment and lack of purchasing power, it is inconceivable that levying a tax on manufacturers of from 30 per cent to 50 per cent of the value of cotton which they must purchase will increase employment or the purchasing power of those employed either by the mills or by growers of cotton, or will increase the demand for cotton.

Under the terms of cotton acreage reduction contracts entered into by producers, each producer agrees to reduce the acreage to be planted to cotton by 25%-30% of a specified base acreage. Such a reduction must of necessity result in unemployment and a lessening of purchasing power. That the government anticipates such results is apparent from the provisions of the contract, whereby the producer agrees to "endeavor in good faith to bring about the reduction of acreage contemplated in this contract in such a

manner as to cause the least possible amount of labor, economic and social disturbance," and to "insofar as possible, maintain on this farm the normal number of tenants and other employees." Such agreements are futile, for how can farmers employ the same number of hands when one out of every twelve cultivated acres have been shifted or retired from basic crops during the past year? Is such a result for the welfare of the farmers thus thrown out of work, or for the welfare of employed farmers who must pay increased taxes to provide federal and state relief for the unemployed?

The reduction of the available supply of basic agricultural commodities is subject to the same objection as a forced increase in price. Our farming facilities are necessarily reduced and put in a dormant and nonproductive condition to accomplish the reduction. Foreign farms not subject to the restrictions are free to expand and improve. It is a slow and arduous process to reinstate crops on idle land. Meanwhile foreign farmers reap the benefit of any enforced deficiency in supply and are put in favorable position to compete with their active fields against ours, which are weed grown, eroded or not fertilized. Throughout this year newspapers have from time to time commented on the competition we must meet from Brazilian cotton or foreign wheat now being imported.

If a shortage in basic agricultural commodities does not occur it will be because the higher prices force the people of the United States, to get along with less wheat, corn, cotton, etc., and thus reduce the available market for such commodities. Such results are not for the welfare of those who are unable to buy necessities nor are they for the welfare of the farmers who raise basic or other commodities.

The Act Improperly Delegates Legislative Power to the Secretary of Agriculture.

Whatever may be the powers of Congress to effect the control attempted in this Act, it is submitted that in the Act

which it passed it left to the absolute discretion of the Secretary of Agriculture all the essential decisions to be made including a determination of the rate of tax, which commodities to tax and in what amount, and which crop to restrict and in what amount. In short, Congress delegated to an executive officer legislative powers which under the Constitution it alone can exercise.

The only standard laid down is the effectuation of a declared policy. The policy is to reestablish the purchasing power of certain commodities, but at the same time to protect consumers interests and to have due regard to domestic and foreign markets. These we submit are by no means sufficiently definite to relieve the Act of this objection. This Court has already had occasion to consider similar standards promulgated in the National Industrial Recovery Act, and has unequivocally held that in that act there was an unconstitutional delegation of legislative power to an executive officer. (*Schechter* v. *U. S.*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388).

The Secretary is given no guide to determine when to undertake reduction of a crop, which of several crops to reduce, how much to reduce it or when to stop. He is unlimited in power to make regulations and as shown by the clauses from a crop reduction contract above quoted he has used a free hand in laying down such regulations and has seen fit to bind assenting farmers to any further regulations he may impose in the future. Such regulations are substantially a legislative act in themselves. The effect of such legislation by regulation is not upon assenting farmers alone, but bears fully on consumers and upon non-assenting farmers who are trying to decide what crops will be marketable.

The tax features of the Act carry out this principle of administrative legislation. The tax begins and ends with the determination of the Secretary to control a crop. The rate is to be such rate as will effectuate the declared policy (9(a)). So far as any guide is given the Secretary in de-

termining the rate, subject to his discretion to discard or revise, he is to compute the difference between "fair exchange value" and "current average farm price." Neither of these figures is susceptible of accurate determination, but is subject to individual interpretation and opinion. The rates as determined have not conformed to the "formula" notably in the case of hogs. (The "formula" indicated a tax of $4.28, the initial tax rate was 50c per cwt.)

As with the attempt to intrude through the power of its money upon the rights of the people, this shifting to the executive of broad legislative powers shows an intention to depart from our traditional form of limited government with limits and checks upon each department and to substitute an unlimited government in which the executive is free from restraints.

A study of the Act discloses the true motive behind its passage, which is not the raising of revenue necessary for the maintenance of a federal government, but the purchasing of control of agriculture. If delegation of power is necessary it is for this reason and not for the purpose of raising revenue. In order to achieve this purpose, money is taken from one class under the guise of taxes and paid over to those of another class who will enter into agreements with the government looking to reduction in the production of basic agricultural commodities. It is erroneous to style such agreements as voluntary, for producers of these commodities cannot compete with those who receive rental and benefit payments unless they likewise make themselves eligible for such aid, and submit to control. We have now seen that such control is not determined by Congress, but by administrative officers in the free exercise of their personal discretion.

Congress attempted in its amendments of August 24, 1935, to ratify the taxes levied and other acts done by the Secretary of Agriculture under the authority of the Act as originally enacted. But it is elementary that a principal

cannot ratify what he could not authorize. Congress obviously cannot delegate its legislative powers to an executive officer. Can it be permitted to later validate what has been done by an agent it could not empower?

United States v. *Heinszen,* 206 U. S. 370, when carefully examined seems to require that legislative action taken under an improper delegation of power may not be ratified. Such a rule is essential if Congress and the executive departments are to be kept within the spheres allotted to them by the people in the Constitution.

It is submitted that in this Act, as in the National Industrial Recovery Act, there is an unprecedented departure from constitutional principles which have safeguarded the lives, liberty and property of the American people from the inception of our government. If this Act is upheld, an Act burdening the agricultural class for the benefit of the industrial population would be more than remote possibility. As was said by the Court in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, "The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

Tariffs and Processing Taxes.

It has been argued by some that the processing tax is the farmer's tariff, and that it should be permitted for that reason. The analogy will not bear analysis. The tariff is used as general revenue of the Government for the benefit of all the people. The processing tax is used as revenue for a special group. None of the tariff duties are paid to manufacturers to reduce production. All of the processing taxes are paid to a portion of the farming population to reduce our supply of certain basic commodities. The tariff increase domestic employment. The processing tax decreases domestic employment, both on the farms and in the mills. The tariff increases domestic buying power by

protecting our scale of wages. The processing tax makes no such increase for it takes from one group as much as it gives to another, and in fact limits the buying power of the country as a whole by increasing the price of agricultural commodities to consumers.

Respectfully submitted,

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Farmers' Independence Council of America.

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No. 401

In the Supreme Court of the United States

OCTOBER TERM, 1935

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER, ET AL, RECEIVERS OF HOOSAC MILLS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE ARGUMENT BY TEXAS AGRICULTURAL ASSOCIATION IN BEHALF OF PETITIONER.

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The primary issue raised by this appeal is the validity of the Agricultural Adjustment Act, being the Act of Congress of May 12, 1933, c. 25, 48 Stat. 31, as amended by an Act of Congress approved August 24, 1935, (Public 320, 74th Cong., 1st sess.).

This primary issue involves the questions: (i) Is the tax imposed by the Act a direct or an excise tax?; (ii) Are the provisions for floor-stocks taxes valid?; (iii) Does the Act involve an improper delegation of legislative power?; (iv) Does the Act contravene the Fifth Amendment?; (v) Does the Act contravene the Tenth Amendment?; (vi) Do the Respondents have the right to question the validity of the Act imposing a tax upon them because of the exercise of the fiscal

power of Congress in appropriating the funds raised by such taxes?; (vii) If the Agricultural Adjustment Act, c. 25, 48 Stat. 31, was invalid as originally enacted, has the Congress by the Act approved August 24, 1935, Public 320, 74th Cong., 1st sess., ratified the assessment and collection of taxes under the original Act so that the validity of the assessment and collection of the taxes involved in this case cannot be now questioned.

The questions will be discussed in the order stated.

i.

The Agricultural Adjustment Act, c. 25, 48 Stat. 31, has as its purpose the raising of revenue. This is made evident by the provisions of the Act, including the provisions regarding the use to be made of the funds raised by the taxes assessed and collected under the terms of the Act.

The Act is captioned as "an Act * * * *to raise revenues* for extraordinary expenses incurred by reason of such emergencies, to provide emergency relief with respect to agricultural indebtedness." The language used in section 9 (a), is "*to obtain revenues for extraordinary expenses* incurred by reason of the National Economic emergency, *there shall be levied processing taxes* as hereinafter provided." Section 9 (b) provides that "*the processing tax shall be at such rate.*" Section 19 (a) provides that "*the taxes provided in this title* shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the treasury of the United States." Section 19 (b) provides that "all provisions of law, including penalties, applicable with respect to taxes imposed by section 600 of the Revenue Act of 1926, and the provision of section 626 of the Revenue Act of 1932, shall,

in so far as applicable and not inconsistent" be applied with regard to taxes imposed by this Act, with certain provisions allowing the Secretary of the Treasury to permit a postponement of the payment of the taxes levied by this statute. Provision is made by section 19 (c) for the borrowing of money from the Reconstruction Finance Corporation with which to pay taxes imposed by the Act. Section 12 (b) appropriates the proceeds derived from all taxes imposed under the Act. Sections 15 and 16 primarily deal with the subject of taxes imposed by the Act.

The tax is imposed upon the processing of commodities; the amount, not the rate, being dependent upon the quantity processed. The imposition of the tax is not conditioned on a failure of persons to conform their business operations to certain regulations, but is imposed upon the processing of the commodity. The language of the Act evidences that the purpose of the legislation has a relation to the raising of revenue. This is the test as to whether it is a revenue measure. *United States* v. *Doremus*, 249 U. S. 86; *Arizona* v. *California*, 283 U. S. 423 (455-456). The Act meets this test.

The Constitution divides the taxing power of the general government into two great classes. It grants to the general government plenary and absolute power to levy direct taxes, subject to the limitation that they be apportioned among the several states in proportion to population, and a like power to lay and collect duties, imposts and excises, subject to the limitation that they be uniform throughout the United States. The Sixteenth Amendment did not extend the taxing power to new subjects, but only removed the necessity which might have otherwise existed for an apportionment among the states of taxes laid on in-

come. "The term 'excises' is applied to the taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licensing to pursue occupations, and upon the corporate privilege." This Court has held "that direct taxes, in the constitutional sense, embrace not only taxes on lands and capitation taxes, but all burdens laid on real or personal property because of its ownership; and also taxes on the income of such property." *Cooley's Constitutional Limitations* (8th Ed.) 988-999, 1022; *Pollock* v. *Farmers Loan & Trust Company*, 157 U. S. 429; *Knowlton* v. *Moore*, 178 U. S. 41; *Flint* v. *Stone Tracy Company*, 220 U. S. 107; *Brushaber* v. *Union Pacific Ry. Co.*, 240 U. S. 1; *Stanton* v. *Baltic Mining Company*, 240 U. S. 103; *Peck & Company* v. *Lowe*, 247 U. S. 165; *Eisner* v. *Macomber*, 252 U. S. 189.

The question then arises: Are the taxes imposed by the Agricultural Adjustment Act "excises"?

Section 9 (a) provides that "*the processing tax shall be levied, assessed and collected upon the first domestic processing of the commodity*, whether of domestic production or imported, and shall be paid by the processors." As applied to cotton the Act defines the term "processing" to mean "*the spinning, manufacturing, or other processing* (except ginning) of cotton; and the term 'cotton' shall not include cotton linters." As applied to wheat, rice and corn, the term is defined to mean *the milling or other processing* of the commodities; as applied to tobacco, the term is defined to mean *the manufacturing or other processing* thereof; as applied to hogs, the term is defined to mean *the slaughter for market;* and as applied to all other commodities, it is defined to mean "*any manufacturing or other processing involving the change in the form of the commodity or its preparation for mar-*

ket" * * *. The meaning of the word as involved in this suit must be construed in connection with its associate words "*spinning*" and "*manufacturing.*" *Georgia Warehouse* v. *Jolley*, 157 S. E. 276, 172 Ga. 172. It refers to the conversion of cotton through manufacturing into usable articles of commerce. The term means more than the mere separation of the lint cotton from the seed and the baling of the lint cotton, for the language of the Act expressly includes ginning of cotton from the meaning of the term. This definition of the word brings the tax squarely within the language "excises usually look to a particular subject, and levy burdens with reference to the Act of manufacturing them, selling them, etc." *Knowlton* v. *Moore*, 178 U. S. 41, 88. A tax upon the sale, use or manufacture of property is the character of tax that this Court has held to be an excise, and it is submitted that the tax imposed by this Act meets that test.

ii.

If the tax imposed upon floor-stocks is imposed solely because of the ownership of property, its validity may be questioned; but if the tax is an excise, or is imposed for administrative purposes to prevent evasions, then it can be sustained.

The language of Section 16 (U.S.C.A., Title 7, sec. 616) is important. This Section provides for a tax adjustment, using the language "*upon the sale or other disposition of any article processed*" and "*is held for sale or other disposition.*" Retail stock of persons engaged in retail trade are excepted from the tax imposed by Section 16, sub-section a, but the exception does not include stocks held in warehouses or stocks which are not sold or otherwise disposed of within thirty days from the effective date of the Act.

The tax is imposed upon the holding of the articles for *sale or other disposition.* It is a tax levied upon the intended use of articles that have been processed from a commodity subject to the tax provided in the Act. The Act *does not provide that all persons owning articles* processed from a taxable commodity *shall be liable for the tax,* but that *the tax is imposed on the holding of the articles for sale or other disposition.* This is not a tax based upon ownership, but a tax based upon the use to be made of the article of property. It is a tax upon the holding of the article in contemplation of sale. The language "other disposition" is general, but is clearly limited by the more specific word "sale," which immediately precedes it, to a disposition by sale.

In *First Savings Bank of Ogden* v. *Burnet,* 53 Fed. (2d) 919 (920), the Court considered the language "loss sustained from a *sale or other disposition* of property," as used in Section 202 (a) of the Revenue Act of 1921, and said,

> * * * "We feel constrained to hold that the rule of ejusdem generis is applicable in construing the phrase, and that it relates only to such dispositions of property as are like sales."

In *Alcolea* v. *Smith,* 90 So. 769, 772; 150 La. 482; 24 A. L. R. 815, the Court considered the language "*sale or other disposition*" and said:

> * * * "The word 'sale' conveys no such idea, nor do the words 'or other disposition' which follow it, since a sale is an alienation, a parting with, and 'or other disposition,' following the word 'sale,' means an alienation, or parting with, ejusdem generis as sale; and either the sale of a thing or other disposition of it is the antithesis of the keeping of the thing and the appropriating of it to oneself."

It seems clear that the meaning of the term, "or other disposition," following the word "sale," is limited to such a disposition as would be within the meaning of the word "sale."

It is upon the holding of the article for one purpose, therefore,—the purpose of sale—that the tax is imposed. The tax, being imposed upon the holding of the article for a particular purpose, meets the test of an excise.

This position is sustained by the holding in *Patton* v. *Brady*, 184 U. S. 608, where the Court considered a statute assessing and levying a tax upon articles "held and intended for sale." In the opinion in that case, the Court said:

> * * * "The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article,"

and held the tax imposed by the statute to be an excise.

The construction here contended for of the provisions of the Act imposing a tax on floor stocks appears to be a reasonable construction and consistent with the legislative intent. When so construed, the Act is valid.

It is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, the Courts will adopt that construction which will uphold its validity; there being a strong presumption that the law-making body intended to act within, and not in excess of, its constitutional authority. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531.

These provisions of the Act being reasonably subject to a construction (consistent with the apparent legislative intent) under which the Act would be upheld, it is respectfully submitted that the Act should be given that construction and upheld.

If the Act had not contained provisions for floor-stock taxes and the adjustment thereof, it would, both theoretically and practically, have been possible for designing persons, having knowledge in advance of the effective date of the Act, to circumvent the levy of the tax. Having knowledge that the Act would become effective at a later date, processors could have manufactured large stocks of articles for future sale and use, and have avoided thereby payment of the tax on the commodities processed in the manufacture of such stocks. In contemplation of the suspension or expiration of the Act, they could in like manner have avoided taxes by refraining from processing articles. Such evasions were prevented by the provisions of the Act providing for floor-stock taxes. The provisions were necessary to make sure that the tax fell equally upon all processors. These provisions of the Act were proper to insure uniformity and equality and to prevent attempted evasions of the plain purpose and intent of the Act. The provisions were necessary for the equal enforcement and proper administration of the features of the Act which impose a tax on the processing of commodities.

The assignments of error filed by Respondents in the Circuit Court of Appeals raised, among other questions, the contention that the processing and floor taxes, "if excise taxes, are not uniform throughout the United States, and are therefore not authorized under the Constitution." *Butler* v. *United States*, 78 Fed. (2d) 1 (2). It is essential to the validity of an excise imposed by an Act of Congress that it be "uni-

form throughout the United States." *United States Constitution*, Art. I, sec. 8, cl. 1; II *Cooley's Constitutional Limitations* (8 Ed.) 988.

In *Knowlton* v. *Moore*, 178 U. S. 41 (106, 108), the Court said:

> * * * "By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity."
>
> * * * "But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, *not that in order to levy such a tax objects must be selected which exist uniformly in the several states.*" *(Italics ours)*

The tax is imposed upon the processing of the commodity without limitation as to where the commodity is produced or where processed. The manufacturing in Texas of cloth from cotton is made the subject of the tax, without regard as to where the cotton was produced. The manufacturing in Massachusetts or North Carolina of cloth from cotton is made the subject of the tax, without regard as to where the cotton was produced. The tax is levied on the processing of the cotton into cloth, and this without limitation or restriction as to the place of production or the place of manufacture. Great quantities of cotton are produced in Texas, but if any cotton is produced in Massachusetts, that fact is not generally known. The quantity of cotton consumed in manufacturing processes in Texas is relatively less than the amount consumed in manufacturing processes in other states, but the tax is imposed with uniformity wherever the processing is done. The tax is imposed "by the rule of geographical uniformity," but the object of the tax does not exist uniformly in the sev-

eral states and, indeed, it is not necessary "that in order to levy such a tax objects must be selected which exist uniformly in the several states." *Knowlton* v. *Moore*, 178 U. S. 41.

iii.

The opinion of the Circuit Court of Appeals in this case discusses the power of Congress to control or regulate the production of agricultural commodities and concludes that the power of control and regulation over such matters is left to the states. Whether that question is determinative of the issues involved in this case depends upon whether the Act in question is a revenue measure or only an attempt to regulate and control the production of the commodities named in the Act.

It has heretofore been shown that the Act provides for the raising of revenue and that it meets the test stated in *United States* v. *Doremus*, 249 U. S. 86:

> "Have the provisions in question any relation to the raising of revenue?"

It has been shown that the tax is imposed upon the processing of a commodity without regard to the manner in which the processor may conduct his business, and that it is a tax on the use of commodities and not a tax imposed because of failure to conduct a business according to some prescribed regulation. Apparently the Circuit Court of Appeals did not regard this question as determinative of the issue, because the Court said:

> "The issue of whether under the Act there has been any unauthorized delegation by Congress of its legislative powers is decisive of the case before this Court."

Does the Act involve an unauthorized delegation of the legislative powers of Congress?

It will not be questioned that the *Congress cannot delegate* its discretion under the Constitution to determine what the law should be or its power to enact such law. It cannot be questioned that the *Congress may select* instrumentalities for the purpose of ascertaining facts upon which the operation of a law may depend, or give authority to administrative officers to determine the existence of facts, or give power to administrative officers to prescribe rules in the enforcement and administration of a law, or give to administrative officers the duty to carry out a legislative policy declared by the Congress. *United States* v. *Chemical Foundation*, 272 U. S. 1, 12; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 (85); *Field* v. *Clark*, 143 U. S. 649 (693). The rule is clearly stated in *Panama Refining Co. et al* v. *Ryan et al*, 293 U. S. 388 (426):

> * * * "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

The issue here is: Does the Act delegate the power to make the law, or does it only confer authority to ascertain the facts and to exercise discretion, in pursuance of the law, in its execution?

Section 1 of the Act declares:

> "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities."
>
> * * *

Section 2 (1) declares that it is the policy of Congress

> "To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."

As applied to cotton, the base period is fixed at from August 1909 to July 1914.

Section 3 directs the Federal Farm Board and all departments and agents of the government, excepting the Federal intermediate credit bank, to sell to the Secretary of Agriculture, and authorizes the Secretary of Agriculture to purchase, all cotton now owned

by them. Provision is made for settlements necessary in the acquisition of the full legal title of such cotton.

Section 4 authorizes the Secretary to borrow money upon the cotton so purchased.

Section 5 authorizes the Reconstruction Finance Corporation to make loans to the Secretary of funds to be used in acquiring the cotton.

Section 6 authorizes the Secretary to enter into option contracts with producers of cotton; evidently contemplating that such option contracts shall involve the cotton to be purchased by the Secretary under Section 3.

Section 8 provides that in effecting the policy declared (Section 1 and Section 2), the Secretary of Agriculture shall have power

> "To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments."

This language indicates that the Secretary is empowered to provide for rental benefit payments in connection with reduction agreements and that he is empowered to provide for rental or benefit payments upon "that part of the production of any basic agricultural commodity required for domestic consumption."

Section 9 (a) provides that,

> "To obtain revenue for extraordinary expenses incurred by reason of the national economic

emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor."

It is provided that the tax shall terminate at the end of the current marketing year when the Secretary proclaims that the rental or benefit payments shall be discontinued and it is directed that the marketing year shall be ascertained and prescribed by regulations of the Secretary.

Section 9 (b) provides:

"The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity" * * *.

It is provided in this section that if the Secretary has reason to believe the tax, at the rate prescribed, will bring about such reduction in the domestic consumption of the commodity as to result in an accumulation of surpluses or in a reduction of farm prices, then that after notice and hearing and a finding that such results would follow, the processing tax shall be at such rate as will avoid the accumulation of surpluses and depression of prices.

Section 9 (c) provides that,

* * * "the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity

had during the base period" * * * "and the current average farm price and the fair exchange value *shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture.*" *(Italics ours)*

Section 10 (c) provides that the Secretary, with the approval of the President, may make "regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto."

Section 12 (a) makes an appropriation to the Secretary for administrative expenses and for rental and benefit payments.

Section 12 (b) appropriates the proceeds derived from taxes imposed by the Act for expansion of markets, removal of surpluses, administration expenses, rental and benefit payments and refunds on taxes. This Section directs the Secretary of Agriculture and the Secretary of the Treasury to establish the amounts, over and above the appropriation made by Section 12 (a) currently required for the purposes of the Act and authorizes the Secretary of the Treasury, out of any money not otherwise appropriated, to advance to the Secretary of Agriculture the amount so estimated. The amounts so advanced are later to be deducted from the proceeds of the tax imposed by the Act.

Section 14 declares the legislative intent that the provisions of the Act are separable.

Section 16 provides for taxes on floor-stocks at the rate or in an amount equal to the processing tax "which would be payable with respect to the commodity from which processed if the processing had occurred" on the date the tax first takes effect and for adjustments of such tax.

These are the provisions of the Act involved in this case.

The suit originated by the United States filing a claim with the Receivers for processing and floor taxes levied against Hoosac Mills Corporation under Section 9 and Section 16 of the Act. It is not a suit to restrain the levy of a tax or the disbursement of funds under the appropriation made by the Act, but, in so far as Respondents are concerned, it is an attempt to defeat the payment of the taxes levied.

The issue involved is the validity of what has been done under the Act, and not the validity of a threatened action. This distinction is important.

Whether the adjustment or reduction authorized by Section 9 (a) and 9 (b) amount to an improper delegation of power is not involved because the taxes in issue were not levied in connection with any such adjustment or reduction and in the administration of the Act there has not ben any attempt to adjust the rate under either of these provisions. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571 (576); *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 (186); *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210 (235). These provisions of the Act appear to be separable, and even if they were determined to be improper delegations of legislative power, nevertheless the provisions on which rest the tax involved in this case would remain in force. Instead of appearing evident that the Congress would not have enacted the provisions imposing the tax, independently of those which allow the adjustment, the wording of the Act indicates that the Congress would have enacted the provisions imposing the tax, independent of those provisions which permit the adjustment.

But, even if it be considered that the Congress would not have enacted the provisions imposing the tax, independently of the provisions authorizing the adjustment, these latter provisions are sustainable under the decisions of this Court. The authorized adjustment of the rate is to prevent surpluses and the depression of farm prices, clearly indicating that these provisions do not contemplate an increase in the base rate provided for by Section 9 (a), (b) and (c), but a reduction, when necessary, to prevent the conditions described in the Act.

In *Field* v. *Clark*, 143 U. S. 649 (680-697), the Court sustained a statute conferring upon The President authority to suspend, by proclamation, the free introduction of certain commodities when he was satisfied that any country producing such articles imposed duties or other taxes upon products of the United States, which he determined to be reciprocally unequal or unreasonable.

In *Hampton & Co.* v. *United States*, 276 U. S. 394 (404-412), the Court sustained an Act empowering The President to increase or decrease duties to equalize differences ascertained by him between domestic production and the cost of producing like articles in competing foreign countries. The Act involved provided that in ascertaining the differences in cost of production The President should, in so far as he found it practical, take into consideration:

> * * * "(1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a for-

eign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition."

Speaking of this Act the Court said:

> "What The President was required to do was merely an execution of the Act of Congress. It was not the making of law. He was the mere agent of the law making department to ascertain and declare the event upon which its expressed will was to take effect."

It is not conceivable that there would be any greater difficulty to determine that a tax was causing the accumulation of surpluses and depression of farm prices, than it would be to determine the cost of production, including wages, materials and other items entering into such cost of *similar* articles in the United States and in *competing* foreign countries, and the advantage granted to foreign producers by foreign governments and any *other advantages* or *disadvantages in foreign competition.*

If the Act involved in *Hampton & Co.* v. *United States,* 276 U. S. 394, prescribes a certain and definite criteria to be taken into consideration in ascertaining the differences, assuredly, the Act involved in this case speaks with equal certainty. The authority granted the Secretary to make adjustments is analogous to the power upheld in *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502 (504-507).

The issue of unauthorized delegation of legislative power is then, so far as this case is concerned, reduced to the question, "Does the Act delegate to the Secretary the legislative authority to determine a tax rate, and the time when it shall take effect and end; or does the Act prescribe the formula for computing the rate of tax, and the time when it shall begin and

end, depending upon the existence of facts to be ascertained by the Secretary?".

The Act provides that "the processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity" * * * "the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period (August 1909 to July 1914) * * * and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from *available statistics of the Department of Agriculture.*"

This is the formula for computing the rate of tax. Does it fix a certain criteria to be used in computing the rate?

The practice of the Department of Agriculture to collect and publish statistical facts concerning agricultural productions and markets has been in existence for a long period of years. Congress was evidently familiar with this practice and in general with the statistical information available in the Department because it provided that the "current available farm price and the fair exchange values" should be ascertained by the Secretary from such statistics. The facts were so ascertained. (R. 11).

Determination of the "current average farm price and the fair exchange value" involved the application of elementary principles of mathematics to the "available statistics of the Department of Agriculture." The determination of the tax from "the current average farm price and the fair exchange value" at such rate as equals the difference between the current average farm price for the commodity and the fair

exchange value of the commodity involved no more than the application of principles of mathematics to the figures previously determined. (R. 11).

The Congress prescribed the rule by which the rate should be figured and empowered the Secretary to do no more than determine the facts, and apply the facts to the rule and figure the rate from the facts by the rule. There is no more delegation of legislative power here than where a state prescribed by law that a State Tax Board shall ascertain the intangible values of property for purposes of taxation or that such Board shall compute an ad valorem tax rate by dividing the total of all ad valorem taxes collected during the previous year by the quotient of the total valuation of all property within the state divided by 100. The formula is prescribed by legislative enactment, and the administrative officer is directed to ascertain the facts and by applying them to the formula to figure the rate of tax.

In *Michigan Central Railway Company* v. *Powers*, 201 U. S. 245, 297, the Court said:

> "It may be laid down as a general proposition that where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate, there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate."

The Secretary is not empowered by these provisions of the Act to fix the rate; he is directed to compute the rate by a formula prescribed by Congress. The provision of the Act directing the Secretary to compute the rate does not grant to him authority or discretion to determine what the rate shall be,

but imposes upon him a duty to determine existing, controlling facts, and figure the rate on these facts by the formula prescribed by Congress.

The Act provides that a tax "shall be in effect with respect to such commodity from the beginning of the market year" and that "the market year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture."

Cotton matures, is harvested and sold during particular seasons of the year. The same is true of grain crops, such as wheat and corn. In determining the carry-over from year to year it has long been the custom to treat a certain date as the end of one market year and the beginning of another. These dates are well known and understood, not only by experts in the Department of Agriculture, but by the people who are engaged in the planting and production of these commodities and in their marketing and manufacture. The language directing the Secretary to ascertain "the market year" may well be construed as meaning that the market year for each commodity is as has been previously ascertained by the Secretary under departmental rules because it is well known that long prior to the enactment of this statute the Department of Agriculture had recognized certain dates as the beginning of market years for certain commodities. If the language of the Act be construed to mean that the marketing year is as has heretofore been determined by the Secretary under the regulations prescribed in the Department of Agriculture, then the Congress has definitely fixed the period by reference to an existing determination. Such would be a reasonable construction of the language and would not do violence to the apparent legislative intent. So construed, the provision would appear to be entirely valid, and if under some other

construction the provision might be invalid, then that construction should be adopted which will give the Act validity.

On the other hand, if the Congress intended that the tax should take effect from the beginning of the market year, the date to be determined in the future by the Secretary of Agriculture, it is not to be presumed that the Congress intended to delegate to the Secretary an arbitrary discretion to determine the market year. This is because legislative bodies are presumed to act within, and not beyond, their constitutional authority. If the language is construed to mean that the Secretary shall, in the future, ascertain the market years for the commodity then clearly it must be held to mean that he shall ascertain the facts as to what period of time constitutes the market year for the particular commodities involved in the Act. This would involve the finding of an existing fact upon which the tax should operate.

Suppose the Congress had provided for a tax based upon reasonable market value, such market value to be ascertained by the Secretary of Agriculture. The language would not have been indefinite, it would not delegate a power to determine what the rate of tax should be, but would have directed an administrative officer to determine the facts upon which the tax should operate. Throughout this country Boards of Equalization, Tax Assessors and Tax Collectors are daily ascertaining the value of property for purposes of taxation. There is no more difficulty in finding the facts as to "the market year" of a commodity than in determining the market value of a commodity or other article of property subject to taxation.

Sections 2, 8, and 9 should be read together in determining whether there has been an unauthorized

delegation of the power to determine when the tax shall become effective.

Section 2 declares it to be the policy of Congress to establish and maintain an equality between production and consumption of agricultural commodities that will re-establish to farmers prices which will give agricultural commodities a purchasing power, as related to articles consumed by farmers, equivalent to the purchasing power of such commodities during the base period. In enacting the law and declaring this policy, the Congress found, in effect, that such equality did not at the time exist.

Section 8 empowers the Secretary, in order to effectuate the policy of Congress, to provide for a reduction in acreage and production for marketing "through agreements with producers or other voluntary methods" and to make provision for rental or benefit payments in connection with such reduction or upon that part of the production required for domestic consumption.

Section 9 provides that when the Secretary determines "that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination and a processing tax shall be in effect with respect to such commodity."

The voluntary reductions and the rental and benefit payments are to be made, if at all, for the purpose of attaining the policy of the Act. Current consumption in domestic and foreign markets is to be considered as well as the cost of agricultural commodities to the consumer. The Secretary is to determine, through the agencies available to him, when a sufficient number of producers are willing to enter into a voluntary reduction program to effectuate the declared policy of the Act. The Congress has deter-

mined that there is an inequality between production and consumption; that to establish the desired prices, reduction in acreage and rental and benefit payments should be made. The time when the reduction will accomplish the desired is a fact to be found. The practicability of effectuating the policy depends upon the willingness of a sufficient number of producers to enter into voluntary agreements for a reduction of acreage and production with which may be associated rental and benefit payments, and effectiveness of such in accomplishing the desired equality in prices.

The Congress has established the standards and has directed the Secretary to find the existence of certain facts. The Secretary is not empowered to prescribe a tax or the date that a tax shall become effective, but Congress has prescribed a tax and provided that it shall become effective upon the existence of certain facts, to be determined by an administrative officer.

As was said in *Hampton & Co.* v. *United States*, 276 U. S. 394 (407):

> "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation." * * *
>
> "'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'"

The statute involved in *Field* v. *Clark*, 143 U. S. 649 (680), provided that "so often as the President shall be satisfied that the government of any country producing and exporting" certain commodities imposed duties upon agricultural products of the United States which "he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend" * * * "the provisions of this Act relating to the free introduction of sugar" and other named commodities, "for such time as he shall deem just." Speaking of this statute, the Court said:

> * * * "But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. *He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress.* As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *(Italics ours)*

It was impossible for the Congress to ascertain in advance the facts which the Secretary is directed to determine. What he was to do in this relation was not a matter of making law or prescribing a tax, but the determination of facts upon which the Act of Congress should operate.

When the policy of Congress has been attained or the facts upon which the reduction program is to be begun and rental and benefit payments made no longer exist, there will be a termination of the tax. A finding that the conditions upon which the operations of the law originally depended no longer exist does not involve any more exercise of legislative discretion than the original finding of the existence of such conditions.

It is submitted that the rate of the tax is to be determined upon readily ascertainable facts; that the determination of "the marketing year" does not involve the exercise of legislative discretion; that definite standards are prescribed as to the time when the tax shall become effective and as to the time when it shall end.

iv.

The right to select objects and prescribe rates of taxation is reposed in the Congress. It is not for the Courts to weigh the reasonableness of the tax, either as to rate or objects upon which it is imposed. *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27 (58); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (167). "The power to tax involves the power to destroy." *McCullough* v. *Maryland*, 4 Wheat. 316.

In *Billings* v. *United States*, 232 U. S. 261 (282), it is said:

> * * * "It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the amendments thereto, especially by the due process clause of the Fifth Amendment."

In *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1 (24), the Court said:

> "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause."

Magnano v. *Hamilton*, 292 U. S. 40 (44), cites *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, and makes the following statement:

> * * * "Except in rare and special instances the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution."

The "rare and special instances" are illustrated by cases like *Nichols* v. *Coolidge*, 274 U. S. 531;

Schlesinger v. *Wisconsin*, 270 U. S. 230; *Heiner* v. *Donnan*, 285 U. S. 312; and *Hoeper* v. *Commissioner*, 284 U. S. 206.

The tax imposed by this Act is not like the taxes considered in the cases cited as illustrating the instances referred to in the quotation from *Magnano* v. *Hamilton*, 292 U. S. 40.

The assessment of the tax imposed by the Act in question is upon the cotton processed and the amount of the tax is determined by the quantity of cotton processed. The power of the Congress to classify, for purposes of taxation, where the classification bears a reasonable relation to the purpose of the law, cannot be questioned. The processing of agricultural commodities has been classified for purposes of taxation. The classification appears to have a reasonable relation to the purpose of the Act. It cannot be contended either that the Congress cannot classify for the purposes of taxation, or that if this be a classification, that it is an unreasonable and arbitrary classification.

v.

The assignments of error in the Circuit Court of Appeals and the opinion of the Circuit Court of Appeals in this case raise the question as to whether the Act is an attempt upon the part of the Congress to regulate activities solely within the control of the State. *Butler* v. *United States*, 78 Fed. (2d) 1. The question raised is whether the Act violates the Tenth Amendment.

It seems that this question is ruled by *Massachusetts* v. *Mellon*, 262 U. S. 447 (478-488), and not by *Schechter Corporation* v. *United States*, 295 U. S.

495. The Massachusetts case involved the validity of an Act of Congress appropriating money to be apportioned among such of the several states as might accept and comply with its provisions, for the purpose of cooperating to reduce maternal and infant mortality and protect health. A bureau was provided to administer the Act in cooperation with state officers. The Act did not require the states to accept its benefits or undertake to enforce upon the states or the people of the states obedience to any requirement of law, but left it optional with the states whether they accepted or rejected its benefits. The contention was made that the Act constituted an attempt upon the part of the general government to induce the states to yield a portion of their sovereign rights. The Court said:

> * * * "If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."

In the Schechter Corporation case it was said that the codes involved did not merely give voluntary trade or industrial associations privileges or immunities, but involved "the coercive exercise of the law-making power," and that

> "The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, *binding equally those who assent and those who do not assent.* Violations of the provisions of the codes are punishable as crimes." *(Italics ours)*

The distinction between the statute involved in the Massachusetts case and the code and statute

involved in the Schechter case is that the one involved in the former made acceptance of its benefits optional, while the one involved in the latter made obedience to its terms obligatory.

The same distinction exists between the Act involved in this case and the statute and code involved in the Schechter Corporation case. There is no provision in the statute to compel any farmer to enter into an agreement to reduce the acreage planted to cotton or any other commodity mentioned in the statute. There is no provision requiring any farmer to accept any rental or benefit payments. The language of the Act is that the Secretary shall have power to provide for reduction in acreage "through agreements with producers, or by *other voluntary* methods, and to provide for rental or benefit payments in connection therewith." There is no semblance of a requirement or an attempt to require that any farmer enter into a reduction agreement; the acceptance of the benefits of the Act is entirely optional. The Secretary may enter into contracts with such farmers as wish to contract with him, but there is no provision requiring any farmer to so contract or to reduce his acreage. When a voluntary contract is made between the Secretary and a farmer, the Secretary may pay rental or benefit payments to him from money appropriated for that purpose. The right of the State, if any exists, to control commodities to which its land may be planted remains unimpaired by the provisions of this Act. What Congress may have hoped would be the result upon prices and production by the expenditure of money appropriated is one thing; and an attempt upon the part of Congress to *control* a matter of purely State concern would be an entirely different thing.

vi.

The power of Congress to impose a tax is one thing; its power to make an appropriation is another thing. There is a wealth of instances in which Congress has made appropriations similar to the appropriations made in this Act. One purpose for which the money is appropriated is "the removal of surplus agricultural products." In recent years Federal agencies have been authorized to buy agricultural commodities and to lend public money on agricultural commodities. Governmental agencies have been authorized to lend money to banks and trust companies, to irrigation districts, to cities and towns, and to invest public money in the stocks of state and national banks. Public money has been appropriated to promote the public health in the several states; to advance education; for social welfare work; in providing food for needy and distressed people; for making loans to agricultural and livestock raisers in drought stricken areas. Many instances might be furnished where Federal agencies over a long period of years have been authorized to spend Federal money in the relief of physical and economical distresses. There is nothing novel about the appropriation made by this Act.

A citizen might as well be heard to contest the validity of an income or inheritance tax imposed against him on the claim that a part of the tax paid may later be appropriated to some Federal agency to lend to some bank, or to some poverty stricken person in some tenement section of a great city, or to some drought stricken ranchman in the arid part of West Texas, as for Respondents to question the validity of the tax because of the appropriation of the proceeds.

vii.

In the Act approved August 24, 1935 (Public No. 320, 74th Cong., 1st Sess.), amending the Agricultural Adjustment Act, it is provided:

> "The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes" * * * "prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress." * * * "Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.
>
> * * * "The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, as determined, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary" * * *, "and the adoption of other voluntary methods prior to such date" * * * "are hereby legalized and ratified, and the making of all such agreements and payments, the initiation of such programs, and the adoption of all such methods prior to such date are hereby legalized, ratified, and confirmed" * * *.

The power of the Congress to ratify an illegal assessment of taxes which was made under the

faith of congressional enactment, and which taxes the Congress had the power to impose, cannot be questioned. It is within the power of Congress to so ratify an illegal assessment of taxes, even after the commencement of suit for restitution. It has been held that in dealing with the Philippine Islands Congress may delegate legislative authority to agencies selected by it and may ratify the acts of such agents, the same as if the acts had been specifically authorized by prior Act. *United States* v. *Heinszen*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *Dorchy* v. *Kansas*, 264 U. S. 286; *Charlotte Harbor Ry. Co.* v. *Welles*, 260 U. S. 8; *Kansas City So. Ry. Co.* v. *Road Improvement Dist.*, 266 U. S. 379; *Hodges* v. *Snyder*, 261 U. S. 600.

The ratification of the taxes involved in this suit being valid, all questions of improper delegation of legislative power are answered by the ratifying Act.

It is, therefore, respectfully submitted that the processing tax and floor-stocks taxes are valid excises; that there has been no improper delegation of legislative power by the Act involved, and if there ever were such, it has been cured by the validating Act; that the statute does not contravene either the Fifth or Tenth Amendment; that the Respondents have no right to question either the validity of the Act or the validity of the assessment and collection of the taxes involved in this case because of the exercise by Congress of its fiscal power to appropriate the proceeds of the tax, and that the Act should be upheld.

Respectfully submitted,

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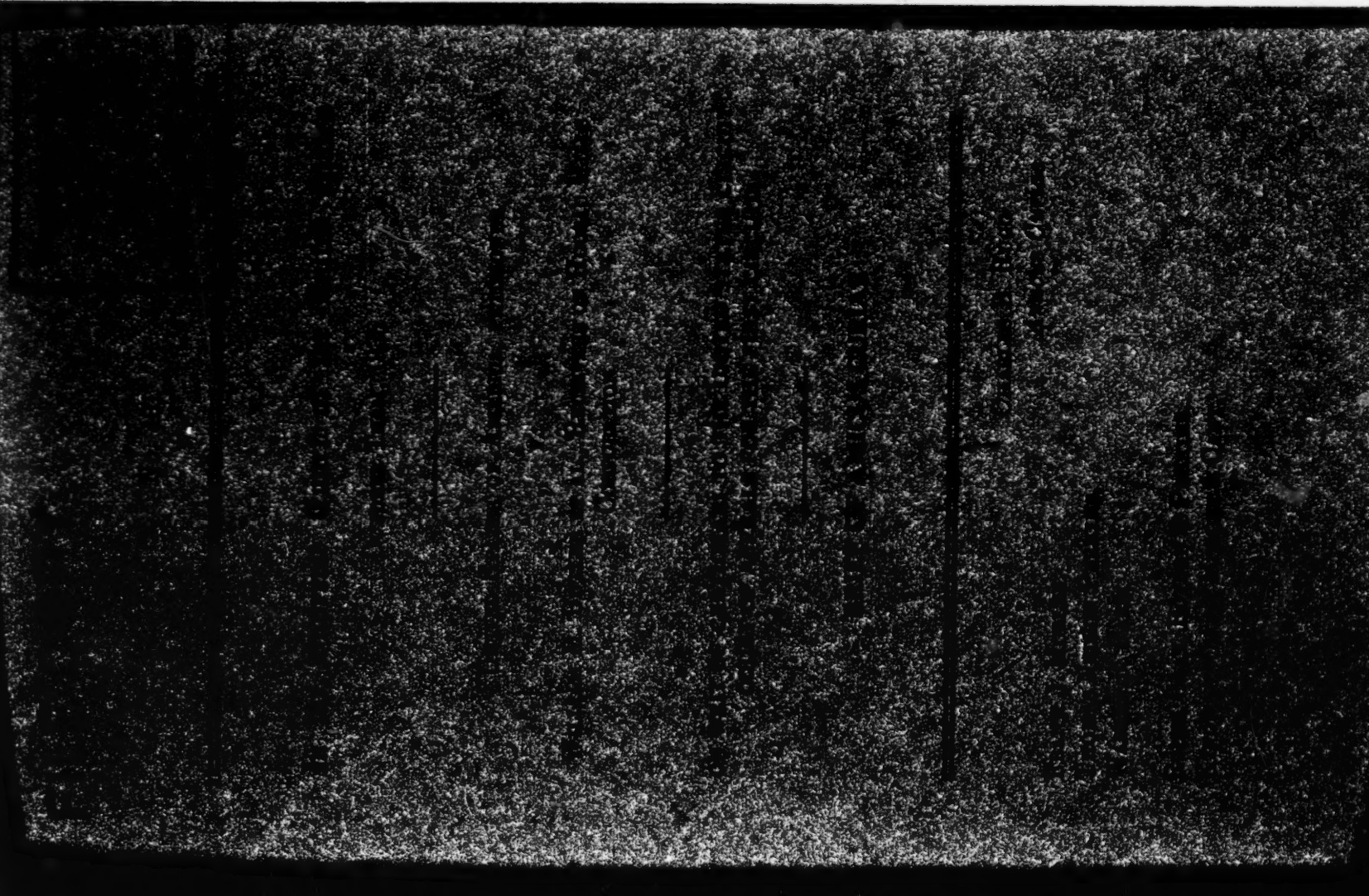

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 401.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER ET AL., RECEIVERS OF HOOSAC MILLS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file a brief as *amicus curiae* in the above-entitled suit. The Solicitor General and counsel for the respondents have assented in writing, as indicated by letters filed with the Clerk of this Court.

Your petitioner applies as counsel for the General Mills, Inc., Pillsbury Flour Mills Co., Commander Larabee Corp., Russell Miller Milling Co., and International Milling Co. Each of these concerns, directly or through its subsidiaries, is engaged in the processing of wheat. Each has paid substantial amounts to the Government as processing taxes. Several suits in equity in various

federal courts, seeking to enjoin the collection of these taxes on the ground of the unconstitutionality of the Agricultural Adjustment Act, have been brought by these mills.

They are all genuinely interested in the decision of the questions concerning the constitutionality of the Act as presented in this suit.

Respectfully submitted,

CHARLES B. RUGG

December 9, 1935.

In the Supreme Court of the United States

OCTOBER TERM, 1935

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UNITED STATES OF AMERICA, PETITIONER

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WILLIAM M. BUTLER ET AL., RECEIVERS OF HOOSAC MILLS CORPORATION

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BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed by counsel for General Mills, Inc., Pillsbury Flour Mills Co., Commander Larabee Corp., Russell Miller Milling Co., and International Milling Co. as *amicus curiae*. It is our purpose to show that the processing taxes assessed pursuant to the Agricultural Adjustment Act are not within the constitutional authority of Congress.

We conceive the determination by this Court in the instant case of the validity of the processing and flour stocks taxes on cotton under the Agricultural Adjustment Act will be decisive of the validity of the similar taxes on wheat.

We do not consider all the issues raised by the assignment of errors in the case. The arguments in this brief are confined to what appear to us to be a few of the more significant points. We have attempted to avoid the repetition of any arguments set forth in the briefs filed by counsel for the respondents or by any other *amici curiae* so far as we have had opportunity to examine them.

In the appendix to this brief we are printing some official documents illustrative of the administration of the wheat program. In the interest of brevity we are not printing the applicable statutes as they are set forth fully in the appendix to the brief for the United States, pp. 1-26. We are filing with the clerk ten bound copies of various other documents issued under authority of the Department of Agriculture respecting the Act in relation to wheat.

SUMMARY OF ARGUMENT

I. The Agricultural Adjustment Act is an effort by the Federal Government to restore agricultural purchasing power to the level prevailing some twenty or more years ago. To that end it attempts to adjust the amount of production of the major agricultural commodities and to insure the receipt by the producers of such commodities of a so-called "parity" price. A study of the application of the Act to a typical agricultural commodity, wheat, shows the manner in which these objectives are attained. Under the wheat adjustment program each producer who is willing to contract to subject his land to the requirements and regulations of the Secretary of Agriculture with respect to production receives a benefit payment on 54.4 per cent of his average production for the past three years. That payment is intended to equalize the difference between the present

market price of wheat and its price, in terms of purchasing power, before the war. The payment serves to increase the income of cooperating farmers directly. But, as the Agricultural Adjustment Administration has pointed out, its primary purpose is to insure that those who would otherwise be tempted not to cooperate will participate in the scheme to reduce production. The processing tax serves to finance this payment. The inauguration, termination and rate of the tax are all calculated with respect to the making of such payments. The tax clearly appears to have as its only purpose the accomplishment of the scheme for adjustment of agricultural production and the fixing of prices for agricultural commodities.

II. In determining whether the processing tax is really a revenue measure, as the petitioner asserts, this Court must scrutinize all the provisions of the Act. To contend otherwise is in effect to say that Congress by calling an act a taxing act can make it so. On the theory that only the sections laying the tax may be looked at, the Child Labor Tax, considered in *Child Labor Tax Case*, 259 U. S. 20, and the Future Trading Act, considered in *Hill* v. *Wallace*, 259 U. S. 44, must necessarily have been held true taxing measures. The indicia of a revenue measure, which the petitioner asserts are borne by the present act, have all been present in other measures which this Court has held not to be tax measures at all. The petitioner's whole argument on this point goes to prove simply that the Act was designed to raise money and required money to effectuate its scheme. But none of the money raised goes to swell the income of the government. It is all devoted in advance to carrying out the scheme for economic reform contemplated by the Act. Measures, the sole purpose of which is to achieve

some such ulterior end, and which do not aim primarily at increasing the income of the government, have consistently been held not to be exercise of the power to lay taxes or raise revenue. They can be sustained as regulations if the government has the power to attain that end by direct legislation, but not otherwise. The Federal Government could not directly fix the prices of agricultural commodities or regulate agricultural production. That is exclusively within the power of the States. It cannot, therefore, achieve the same end through this device. The taxing power, like all the other federal powers, cannot be used for the sole object of accomplishing purposes not entrusted to the Federal Government. The petitioner's suggestion that, so long as coercion is not used, Congress is unfettered in the choice of the functions it may perform runs squarely counter to considered pronouncements of this Court from the time of Chief Justice Marshall to the present day. The test is not whether the purposes or ends which it is sought to accomplish are achieved by coercion, but whether, however achieved, they are the kind of purposes or ends which have been entrusted to the Federal Government.

III. An immediate object of the processing tax is to compel the processor to make up the difference between market and parity prices in order that the purchasing power of the farmer may be increased without the delay incident to the operation of the production control program. In this aspect the tax is clearly a price fixing device. In the case of wheat, since the difference between market and parity price was found at the inception of the program to be thirty cents per bushel, a processing tax at that rate was put into effect and cooperating farmers were paid thirty cents per bushel on their

domestic allotments, less a small deduction for administrative expenses. Thus the taxing machinery of the Government is used as a mere conduit through which the additional payment necessary to make up a predetermined price passes from one party to the other. Clearly this is a police measure and not within the constitutional powers of the Federal Government. It is price regulation coupled with confiscation. It is not in aid of or incidental to the laying of a tax, but is the express purpose of the levy. ' It cannot be sustained as an exercise of the taxing power.

IV. The processing tax is not in truth a tax because its immediate purpose is a private one, and the public purpose is secondary and remote. This question may be raised by the processor, notwithstanding the decision in *Massachusetts* v. *Mellon,* 262 U. S. 447, because his interest is substantial and the purposes for which his money is to be taken are expressed in the statute imposing the levy. *Loan Association* v. *Topeka,* 20 Wall. 655, and other decisions of this Court establish the principle that money cannot be raised under the taxing power for primarily private purposes, even though the public will be indirectly benefited. The processing tax is used to increase the financial resources of the farmer. The proceeds are expended in aid of private enterprises, and although improvement of the economic condition of the farmer may ultimately benefit the general public, the anticipated benefit to the public is too speculative and indirect to justify the raising of money by taxation. The rule of the *Loan Association* case, *supra,* applies to state and federal taxation alike. The "general welfare" clause does not enlarge the power to lay taxes, but merely requires that it be used for the benefit of the nation as a whole. It has no bearing on the distinction between pub-

lic and private purposes, and does not empower the Federal Government to lay taxes for purposes which will benefit the public in only a secondary manner.

ARGUMENT

I.

AN ANALYSIS OF THE ACT AND OF ITS ADMINISTRATION WITH RESPECT TO WHEAT, A TYPICAL AGRICULTURAL COMMODITY

A. The General Purposes and Mechanics of the Act Itself

The ultimate purposes of the Agricultural Adjustment Act need not be speculated or conjectured. They are expressly and frankly avowed by Congress. The primary purpose stated in the title of the Act is "to relieve the existing national economic emergency by increasing agricultural purchasing power". The economic emergency, which, it is declared in Section 1 of the Act, renders imperative the immediate enactment of Title I of the Act, is said to be in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities. The policy of Congress, set out in Section 2 of the Act, is to correct that disparity by establishing and maintaining such balance between the production and consumption of agricultural commodities and such marketing conditions therefor as will reestablish prices to farmers, in terms of purchasing power, at the level existing between August, 1909 and July, 1914. As is said in U. S. Dept. of Agriculture, *Agricultural Adjustment in 1934*, p. 2:

> "The act was directed mainly toward correcting those economic conditions in agriculture which had impoverished the farmers and were impeding national recovery. It recognized a disparity between farm prices and prices of nonagricultural products. . . . The act established a specific measure of ex-

change value for farm products, as an equitable goal for farm prices and an objective for price-improvement efforts.".

This underlying objective of the Act, to raise the purchasing power of farmers to the point it had reached some twenty years ago, is to be achieved by balancing production and consumption and regulating marketing conditions. These intermediate objectives are to be reached primarily through exercise of the powers conferred on the Secretary by Section 8 of the Act.

The powers there given are broadly sketched rather than sharply defined. Detailed directions as to the manner of their exercise are lacking. But they are conferred and to be exercised only "in order to effectuate the declared policy". To that end the Secretary is empowered, by subsection 1 of Section 8, to provide for reduction in acreage or in production for market of the basic agricultural commodities, designated in Section 11 of the Act, through agreements or other voluntary methods, and to provide for rental or benefit payments. For the same purpose, he is authorized, by subsection 2 of Section 8, to enter into marketing agreements with processors, producers and others, and, by subsection 3, to issue licenses, permitting processors, associations of producers and others to handle in interstate or foreign commerce any agricultural commodity or competing commodity or their products.

The Secretary has exercised those powers in the inauguration of so-called "adjustment programs" for many of the agricultural commodities designated in Section 11 of the Act, in effecting marketing agreements with processors and producers covering other commodities not specified in the Act and in issuing licenses in a few instances. See U. S. Dept. of Agriculture, *Agricultural Adjustment in 1934*, pp. 3-8. By August 24,

1935, the date of the recent amendments to the Act, "adjustment programs" were in effect with respect to cotton, wheat, tobacco, field corn, hogs, sugar, peanuts, rice and rye. Those programs and all rental and benefit payments made thereunder were expressly legalized, ratified and confirmed by Section 21(c) of the Act added by the recent amendments. The stamp of Congressional approval was thus placed upon the manner in which the Secretary exercised his authority in establishing adjustment programs. Those programs may, therefore, be read into the Act and Section 8(1) may be treated as if it specifically provided for the detailed methods for reduction adopted by the Secretary.

An analysis of an adjustment program will thus show how Congress intended to achieve a balance between production and consumption of a particular commodity through the payment of rental and benefit payments provided for in Section 8. The wheat program is a good example. It covers one of the most important commodities designated in the Act. It was one of the first programs adopted.

B. The Application of the Act in the Wheat Adjustment Program

On June 16, 1933, a plan for applying the provisions of the Act with respect to 1933, 1934 and 1935 wheat crops was announced. See Official Statement of the Wheat Adjustment Plan, Appendix, *infra*, pp. 47-51. This plan provided in substance that each wheat grower who agreed, if required, to reduce his acreage for 1934 and 1935 by not more than 20 per cent of his average acreage during the preceding three years, and who sowed his wheat so that, at the average yield for the last three years, it would produce the number of bushels allotted

to him, would receive benefit payments on that number of bushels. Such allotments were to be proportionate to the grower's share in the total amount of wheat produced in this country which was domestically consumed. The plan contemplated the "organization of semi-legal community machinery" through which its provisions could be effectively applied to producers. See U. S. Dept. of Agriculture, *Handbook of Organization and Instructions* (W-15), p. 35. To participate in the plan a wheat grower was required to make a formal application to enter into a wheat allotment contract. That application contained detailed information as to the crops planted for 1933 and as to the acreage seeded and harvested and the total production in each of the preceding three years. See Application for Wheat Allotment Contract, Appendix, *infra*, pp. 52-57. Upon the signing of this application, the grower was eligible to become a member of the Wheat Production Control Association for his county, to attend its organization meeting and elect its directors. Members of that Association elected also the County Allotment Committee to which was entrusted the task of determining the individual allotment of each grower in the community. That was an elaborate process. It is described in detail in U. S. Dept. of Agriculture, *Handbook of Organization and Instructions* (W-15), pp. 20-33. From statistics computed by the Bureau of Agricultural Economics it had been decided that 54.4 was the "domestic taxable consumption percentage." 54.4 per cent of the average nation wide production of wheat from 1928 to 1932 was accordingly divided among the States according to their corresponding production during that period and subdivided in each State among the several counties. The County Allotment Committees were required to allot to each individual farm on the basis of its average

production during the preceding three year period its share of the county allotment. That was done in accordance with the plan selected by directors of the Wheat Control Association from among the several possible County Allotment plans. Upon the number of bushels so determined, the grower could expect to receive benefit payments in 1933, 1934 and 1935 if he entered into a wheat allotment contract with the Secretary of Agriculture.

That contract[1] bound the grower to reduce his acreage planted to wheat in 1934 and 1935 in an amount prescribed by the Secretary, but not in excess of 20 per cent of the average annual acreage for the last three years, and to seed in 1934 and 1935 an acreage sufficient to produce at the average yield the number of bushels allotted to the farm. In consideration therefor, the Secretary agreed to make an adjustment payment in 1933 of not less than 28 cents on each bushel allotted and to make payments in 1934 and 1935 tending to give the grower the "parity" price on that allotment if the current farm price for wheat was below "parity". The contract was non-assignable and its covenants were to run with the land. The whole agreement was expressly made subject to regulations theretofore or thereafter prescribed by the Secretary pursuant to the Act.

To ensure compliance with the agreements, a vast administrative machinery was set up.[2] See U. S. Dept. of Agriculture, *Handbook on Compliance* (W-40). Detailed regulations and rulings were promulgated, cover-

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[1]See Wheat Allotment Contract, Appendix, *infra*, pp. 58-61; Wheat Adjustment Contract for 1936-1939, Appendix, *infra*, pp. 66-70.

[2]See, for example, the elaborate method of computing and recording the acreage taken out of production. U. S. Dept. of Agriculture, *The Computation of Acreage under Production-Control Contracts* (W-43).

ing among other things, use of the acres taken out of production, the interpretation of the contract, and methods of allotment and of compliance.[3]

The whole plan was designed to attain the objective of the Act, of increasing farm purchasing power, in two ways. In one sense, that objective was to be attained directly and immediately through the contribution to the income of co-operating growers by means of the benefit payment. As was said in the Official Statement of the Wheat Adjustment Plan (Appendix, *infra*, p. 50) the program was intended to secure to co-operating growers "a sum equivalent to the parity price on that portion of their production which is required for domestic consumption. The sum will be made up of two parts: (a) The prevailing market price at which the grower sells his wheat, and (b) the payment made under the Act."

The ultimate aim of the program, however, was not to raise farm purchasing power simply by such direct contributions to income. The mere distribution of funds to those who co-operated was not the final goal. A more fundamental attack was made on the problem. The plan was to curtail production so as to limit supplies of wheat and thus, through the operation of the law of supply and demand, permanently establish a higher price level for all wheat sold. The Agricultural Adjustment Administration points that out in its *Handbook of Organization and Instructions* (W-15) at page 13:

> "Without that readjustment, a processing tax upon wheat, payable to wheat growers, would increase production, would lower ultimately the base price, and make it necessary to increase the tax. This proc-

[3] See U. S. Dept. of Agriculture, Wheat Regulations, Series 2, and Administrative Rulings Relating to the 1933-34-35 Wheat Allotment Contract.

> ess would go on until an unmanageable surplus would demoralize the wheat market."

As the petitioner says in its brief (Brief, p. 198), control of production was deemed essential to a permanent solution of the farm problem. But that control could not be achieved except through "the centralizing power of the Government". See U. S. Dept. of Agriculture, *Agricultural Adjustment,* at page 9. In that document the Administrator of the Agricultural Adjustment Act further stated (p. 9):

> "Experience of cooperative associations and other groups has shown that without such Government support, the efforts of farmers to band together to control the amount of their product sent to market are nearly always brought to nothing. Almost, always, under such circumstances, there has been a noncooperating minority, which, refusing to go along with the rest, has stayed on the outside and tried to benefit from the sacrifices the majority has made."

It is here that the benefit payment serves its other purpose. It is designed, as the Administrator puts it (p. 9), "to keep this noncooperating minority in line, or at least prevent it from doing harm to the majority." It is "a mechanism to control supplies to profitable demand." U. S. Dept. of Agriculture, *Handbook of Organization and Instructions* (W-15), p. 13.

Manifestly neither Congress nor those administering the Act believed that the fundamental purposes of the Act could be attained by any temporary measures. On the contrary, the whole scheme contemplated permanent adjustment of production and permanent maintenance of the desired price level. The President recognized this in his statement to the press, on October 25, 1935, as to the future of the Act:

> "But it was never the idea of the men who framed the act, of those in Congress who revised it nor of Henry Wallace nor Chester Davis that the AAA should be either a mere emergency operation or a static agency.
>
> "It was their intention—as it is mine—to pass from the purely emergency phases necessitated by a grave national crisis to a long time, more permanent plan for American agriculture."

See *The Southwestern Miller*, Vol. 14, No. 35, p. 33. The continuation of the program so far as it related to wheat was announced on August 10, 1935. See U. S. Dept. of Agriculture, *Wheat Adjustment Handbook—1936-1939*, p. 1. It was contemplated that contracts similar in form to the original 1933 contract should be made with growers covering the period from 1936-1939. See Wheat Adjustment Contract for 1936-1939, Appendix, *infra*, pp. 62-70. This program was ratified by Congress in Section 21(c) added by the amendments to the Act. Congress itself, by amplifying the Act in the amendments approved August 24, 1935, and by specifically fixing the rate of taxes on particular commodities through December 31, 1937, has firmly indicated its intention that the Act was no "mere emergency operation".

C. The Place of the Processing Tax in the Scheme of the Act

The wheat adjustment plan was formally initiated by proclamation of the Secretary of Agriculture on June 20, 1933, of his determination to make benefit payments with respect to wheat. Under the terms of Section 9(a) of the Act a tax upon the processing of wheat came into effect automatically at the beginning of the marketing year for wheat next following that proclamation.[4] In the words

[4] The first marketing year for wheat was proclaimed to begin on July 9, 1933. U. S. Dept. of Agriculture, Wheat Regulations, Series 1.

of that section, the tax was laid "to obtain revenue for extraordinary expenses incurred by reason of the national economic emergency." But, as the Act shows, the principal "extraordinary expenses" which the proceeds of the tax were to pay were the benefit payments under the plan. Thus, the rate of tax was prescribed by Section 9(b) and (c) to equal the difference between the current average price for wheat and its price, in terms of purchasing power, prevailing between August, 1909 and July, 1914. The gap between the actual and "parity", or ideal, price which the benefit payment was to bridge is, therefore, the precise measure of the tax.[5]

The tax on any commodity comes into effect only when the Secretary proclaims his determination to make rental or benefit payments with respect to that commodity. Section 9(a). It terminates at the end of the marketing year during which the Secretary proclaims that such payments are to be discontinued. Section 9(a). The inauguration, the termination and the amount of the tax are, therefore, all bound in with the making of rental or benefit payments. Moreover, under Section 12(b) of the Act the proceeds of all processing taxes were directly appropriated to the Secretary to be available for the expansion of markets, administrative expenses, rental and benefit payments and refunds on taxes. The function of the tax in serving primarily as a means of financing the benefit payments has been con-

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[5] This is well put in *The Processing Tax*, a pamphlet issued by U. S. Dept. of Agriculture, at p. 4:

> "For instance, in 1932 it took nearly 2 bushels of wheat to buy as much industrial goods as one bushel would buy before the war. By adding 30 cents per bushel to the 1932 market price of wheat the old buying power could be restored. That is why the processing tax was set at 30 cents per bushel, and most of this money was paid to cooperating farmers in the form of benefit payments."

sistently emphasized by the Department of Agriculture.[6] The amount of the benefit payment on any commodity was regarded as dependent upon the estimated amount of the taxes to be collected upon the processing of the commodity. See Official Statement of Wheat Adjustment Plan, Appendix, *infra*, p. 49. In accordance with the formula prescribed in the Act, the Secretary had fixed the rate of tax at 30 cents per bushel of 60 pounds.[7] Since, in the Official Statement of the Plan, it was estimated that "the whole plan would be accomplished at an annual administrative cost of 2 cents per bushel", the benefit payment on each bushel of the allotted amount was originally fixed at 28 cents.[8]

II.

THE ACT IS NOT A REVENUE MEASURE. THE TAXES ARE SIMPLY THE MECHANICS TO ACHIEVE AN ECONOMIC REFORM WHICH CONGRESS MAY NOT ACCOMPLISH DIRECTLY OR INDIRECTLY

The place of the tax in carrying out the program is clear. As the Agricultural Adjustment Administrator said, it is "the heart of the law" and a means of "accomplishing one or both of the two things intended to

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[6] Thus it is stated, perhaps not too precisely, in U. S. Dept. of Agriculture, *Achieving A Balanced Agriculture*, p. 38:

> "Farmers should not forget that all the processing tax money ends up in their own pockets. Even in those cases where they pay part of the tax, they get it all back. Every dollar collected in processing taxes goes to the farmer in benefit payments."

See also U. S. Dept. of Agriculture, *The Processing Tax*, p. 1:

> "Proceeds of processing taxes are passed to farmers as benefit payments."

[7] U. S. Dept. of Agriculture, Wheat Regulations, Series 1.

[8] In May, 1934, it was raised to 29 cents. See U. S. Dept. of Agriculture, *Agricultural Adjustment in 1934*, p. 75. Subsequently, in August, 1935, it was raised to 33 cents.

help farmers attain parity prices and purchasing power". See U. S. Dept. of Agriculture, *Agricultural Adjustment,* p. 9. It is not pretended that it serves any other purpose or has any other function than as an instrument for achieving the economic and social reform at which the Act aims. Plainly, this Court cannot overlook that fact. As was said in *Child Labor Tax Case,* 259 U. S. 20, 37: "All others can see and understand this. How can we properly shut our minds to it?" We submit that the taxing provisions of the Act cannot be considered as if they stood alone. Their validity can be tested only in relation to their ultimate purpose. We recognize, of course, that a law which purports to do no more than impose a tax is not to be judged in the light of the supposed motives that induced it or the effects that flow from it. *McCray* v. *United States,* 195 U. S. 27; *A. Magnano Co.* v. *Hamilton,* 292 U. S. 40. But where the real purpose of a measure laying a tax is apparent on its face, courts are not powerless to ascertain and weigh that purpose when the validity of the measure is challenged. On the contrary, all its provisions must be carefully scrutinized to determine what the primary purpose of the measure is. *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *A. Magnano Co.* v. *Hamilton, supra,* at 45, 46. This Court said in *Nigro* v. *United States,* 276 U. S. 332, 353: "Congress by merely calling an Act a taxing act cannot make it a legitimate exercise of taxing power under Sec. 8 of Article I of the Federal Constitution, if in fact the words of the act show clearly its real purpose is otherwise". It is, therefore, idle to contend, as the petitioner does, that apart from the use to which the proceeds of the taxes are put, the provisions of the Act, so far as they lay processing and floor-stock taxes, are nothing but a revenue measure.

The question whether the Act is a revenue measure must be decided in the light of its ultimate purpose so far as that is apparent from its other provisions.

A. The Act Is Not A Revenue Measure Simply Because It Raises Money

The petitioner contends that because the taxing provisions of the Act have the indicia of a revenue measure they must be treated as a revenue measure whatever their ultimate purpose may be (Brief, pp. 24-29). It points to the fact that the title of the Act expresses the purpose of raising revenue, that proceeds of the taxes are paid into the Treasury of the United States, that appropriation is made of the revenue expected to result, and that in actual operation vast sums of money have been raised (Brief, pp. 25, 26). But all these elements have been present in other measures which, because of their ultimate purpose, have been held not to be revenue measures at all. Of course, the fact that the title of the Act states that one of the purposes of the Act is "to raise revenue for extraordinary expenses" has no tendency to prove that it is a revenue measure. Other acts, not revenue measures, have expressed such a purpose. *Child Labor Tax Case,* 259 U. S. 20; *Board of Trustees of the University of Illinois* v. *United States,* 289 U. S. 48. Nor does the fact that the Act has raised vast sums of money prove it to be simply a revenue measure. Thus in the *Head Money Cases,* 112 U. S. 580, the provision of an "Act to regulate immigration", requiring shipowners to pay a duty on each passenger coming to any port within the United States from a foreign port, was deemed not to impose a tax. Similarly in *Board of Trustees of the University of Illinois* v. *United States,* 289 U. S. 48, this Court de-

clined to treat the Tariff Act of 1922, which imposed duties upon the importation of particular articles, as an exercise of the power to lay taxes. So state laws providing for the exaction of money in the form of a tax have often been treated as not revenue measures at all. *Phillips* v. *Mobile,* 208 U. S. 472; *Gundling* v. *Chicago,* 177 U. S. 183; *Morgan* v. *Louisiana,* 118 U. S. 455. Payment of the money raised into the Treasury of the United States is immaterial. Money is frequently paid into the treasury of a government to be held as a fund for particular purposes. See *Head Money Cases, supra* (funds raised from duty paid into Treasury of the United States to be used for the temporary care of immigrants); *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U. S. 330 (funds raised by compulsory assessments on carriers under the Railroad Retirement Act, Act of June 27, 1934, c. 868, 48 Stat. 1283, paid into Treasury of United States); *cf. Mountain Timber Co.* v. *Washington,* 243 U. S. 219 (assessments under the Workmen's Compensation Act of Washington paid into treasury of State). Such payment does not make the exaction a tax. Nor is appropriation of the fund important. In the *Head Money Cases, supra,* the funds raised by the exaction were appropriated to the purposes of the statute. Yet it was held that the exaction was not a tax within the meaning of the Constitution.

The petitioner's analysis proves no more than that the Act requires, and has raised, money to accomplish its plans of economic and social reform. Because it does so, the petitioner contends that it is a taxing act and that the reform plan may be justified as an exercise of the power to lay taxes. But, as this Court has frequently pointed out, that power may be made the basis for achieving social ends only so far as those ends are

incidental. They must "be reached only through a revenue measure and within the limits of a revenue measure." *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 402; *Linder* v. *United States,* 268 U. S. 5, 17. As it was put in *Hampton & Co.* v. *United States,* 276 U. S. 394, 412:

> "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate Congressional action."

See also *Child Labor Tax Case,* 259 U. S. 20, 38; *Nigro* v. *United States,* 276 U. S. 332, 354. Unless the primary purpose of the act is to secure income available for expenses and obligations of the government, it is not, it is submitted, a revenue raising measure at all. "Revenue", as this Court said in *United States* v. *Bromley,* 12 How. 88, 97, "is the income of a State". The power to tax is the power to provide that income. Where a law does provide it, it is nonetheless a revenue measure because it also achieves, and was intended to achieve, some regulatory purpose. *License Tax Cases,* 5 Wall. 462; *United States* v. *Doremus,* 249 U. S. 86; *Nigro* v. *United States,* 276 U. S. 332; *Hampton & Co.* v. *United States,* 276 U. S. 394. But where funds are raised not to furnish income for the government but simply to provide the mechanics for achieving a plan of social or economic reform, the plan cannot be justified under the power to raise revenue. In such a case, reform is not incidental to the tax; the tax is incidental to reform.

It has frequently been held that a measure raising funds, which can never go to swell the income of the government but are all devoted to carrying out some

other function of the government, is not a taxing or revenue raising measure at all. In the *Head Money Cases,* 112 U. S. 580, the funds raised, although paid into the United States Treasury, were, under the terms of the Act, to be used solely to defray the expense of regulating immigration and for the care and relief of immigrants. The Court there said, at page 595:

> "The sum demanded of him [the shipowner] is not, therefore, strictly speaking a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed."

In *Morgan* v. *Louisiana,* 118 U. S. 455, 461, in answer to the contention that a statute imposing a quarantine fee was a tax on tonnage and so unconstitutional, it was said:

> "A tax is defined to be 'a contribution imposed by government on individuals for the service of the State'. It is argued that a part of these fees go into the treasury of the State or of the city, and it is therefore levied as part of the revenue of the State or city and for that purpose. But an examination of the statute shows that the excess of the fees of this officer over his salary is paid into the city treasury to constitute a fund wholly devoted to quarantine expenses, and that no part of it ever goes to defray the expenses of the State or city government."

Cases dealing with the provision of Section 7 of Article I of the Constitution, requiring "all bills for raising revenue" to originate in the House of Representatives, further illustrate that the raising of funds for the accomplishment of a purpose other than meeting the expenses of the government is not an exercise of the taxing power. In *Twin City Bank* v. *Nebeker*, 167 U. S. 196, Section 41 of the National Bank Act, c. 106, 13 Stat. 99, 111, requiring associations organized under the Act to pay a duty upon the average amounts of their notes in circulation, was held not to be a true revenue measure.

The Court said, at 203:

> "The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States, and be available in every part of the country. There was no purpose by the act or any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the government."

Again, in *Millard* v. *Roberts*, 202 U. S. 429, acts of Congress providing for the elimination of grade crossings, the relocation of tracks and the building of a union station in the city of Washington, D. C., and requiring a tax to be levied and assessed to provide funds to be paid to the railroads for carrying out those purposes, were held not to be revenue measures because, as the Court put it, at page 437:

> "Whatever taxes are imposed are but means to the purposes provided by the Act."

See also *United States* v. *Norton*, 91 U. S. 566; *Twin Falls Canal Co., Ltd.* v. *Foote*, 192 Fed. 583 (C. C. D. Idaho).

The present Act, like the acts considered in *Head Money Cases*, 112 U. S. 580, *Twin City Bank* v. *Nebeker*, 167 U. S. 196, and *Millard* v. *Roberts*, 202 U. S. 429, does not purport to be simply a measure to raise money to meet the general expenses and obligations of the government or even to pay particular debts. Its purpose is something quite different than the mere raising and spending of money. Whatever sums it raises are but a means to effectuate its great object—the carrying out of a scheme to raise agricultural prices and to balance production of agricultural commodities with the demand therefor. Only such sums as will be necessary to achieve that object are raised. All such sums are appropriated in advance to be used only for that purpose.

Where the government has the power to accomplish its ends through direct legislation, its action is not invalidated because it does so through an exaction loosely termed a "tax." *Head Money Cases*, 112 U. S. 580, 596; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237. But that exaction is not sustained as an exercise of the power to raise revenue. It must stand or fall as a regulation. *Head Money Cases*, 112 U. S. 580. Where, however, the government has no such power, the exaction cannot, it is submitted, be sustained. If it is not strictly a tax, but simply the mechanics for accomplishing economic or social reform, its validity is dependent on the power of the government to accomplish that reform directly.

B. Direct Legislation to Accomplish the Purposes of the Act Is Beyond the Power of Congress

But the Federal Government is not empowered to achieve directly the ends at which the Agricultural Adjustment Act aims. Both the fixing of prices for agricultural commodities and control over the production and

marketing of such commodities are beyond its province. The power to establish by direct legislation the prices for agricultural commodities rests, if anywhere, with the States. *Cf. Nebbia* v. *New York,* 291 U. S. 502. So, too, does the power to limit the production of agricultural commodities. *Cf. Champlin Refining Co.* v. *Corporations Commission of Oklahoma,* 286 U. S. 210. This Court pointed out, in *Kidd* v. *Pearson,* 128 U. S. 1, 21, that the effective regulation of agriculture, horticulture, stock raising and the like requires control of "delicate, multiform, and vital interests—interests which in their nature are and must be local in all the details of their successful management." As Thomas Jefferson aptly remarked (Writings (Ford Ed.), Vol. I, p. 113):

> "Were we directed from Washington when to sow, & when to reap, we should soon want bread."

It is, of course, fundamental that Congress has no general authority to legislate for the nation as a whole. *Kansas* v. *Colorado,* 206 U. S. 46. Nor does the Constitution confer upon Congress any police power. *Keller* v. *United States,* 213 U. S. 138; *United States* v. *DeWitt,* 9 Wall. 41. Plainly the power to regulate interstate commerce would not sustain direct legislation to achieve the ends aimed at in the present Act. That power would permit control of the prices and the production of agricultural products only so far as they were "in the current of" or directly affected interstate commerce. *A. L. A. Schechter Poultry Corporation* v. *United States,* 295 U. S. 495. But in this Act, as was said with relation to the Future Trading Act in *Hill* v. *Wallace,* 259 U. S. 44, 68, 69, Congress "did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter

clause." Nor does the petitioner in its brief suggest that the broad purposes of the Act could be reached directly under that power.

It is, however, urged that the scheme of the Act may be justified as an exercise of the powers of Congress to stabilize and preserve the credit structure of the nation, to protect the banks and other credit agencies which Congress had established and to protect the credit of the Government itself (Petitioner's Brief, pp. 241-262). The argument apparently is that Congress may adopt any measure reasonably appropriate to improving the economic life of the country on the basis of a broad power to preserve the national credit. But, as was said in *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 549, "The argument of the Government proves too much." If it were sound, "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." *A. L. A. Schechter Poultry Corporation* v. *United States, supra*, at 548. In effect, the suggestion is not substantially different from that made and decisively rejected by this Court in *Kansas* v. *Colorado*, 206 U. S. 46, 89-91, that all powers which are national in their scope must be found vested in the Congress of the United States.

C. Congress May Not Use the Taxing Power for the Sole Purpose of Achieving Ends Not Entrusted to the Federal Government

If Congress cannot legislate directly to attain the end sought, it cannot, it is submitted, attain it indirectly through the device of raising and spending money solely for that purpose. Where the purported exercise of a federal power achieves no other purpose and has no other aim than to perform a function within the power

of the States, it is invalid. *Hammer* v. *Dagenhart*, 247 U. S. 251; see *Nigro* v. *United States*, 276 U. S. 332, 353; *Linder* v. *United States*, 268 U. S. 5, 17; *United States* v. *Doremus*, 249 U. S. 86, 93. The petitioner contends that this principle is inapplicable to the present Act because Congress has attempted merely to *affect* production and prices, not *regulate* them (Petitioner's Brief, pp. 262-279). That is to say, in effect, that Congress is completely unfettered in the choice of the functions it may perform so long as it can perform them without coercion. It may assume the normal and ordinary duties of the States if it can so frame the means used as to avoid semblance of regulation. It cannot obtain sovereignty by force, but it may by purchase.

The potentialities of the petitioner's argument are obvious. If Congress may raise and spend money for the sole purpose of achieving ends hitherto admitted to be within the exclusive power of the States, all the other limitations on its powers become futile. Indeed, Congress has already acted upon that assumption. By Acts of August 29, 1935, Public No. 399 and Public No. 400, it has attempted to provide a retirement system for employees of carriers, through the exercise of the power to tax and appropriate, which this Court held it could not provide through the exercise of its power to regulate commerce. *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330. By Act of August 14, 1935, Public No. 271, it has attempted through the exercise of similar powers to establish a system for paying monthly old-age benefit payments to individuals, with certain exceptions, over the age of sixty-five. Is it not reasonable to expect that it may attempt to use the same device to establish the wages and hours of employees in the internal commerce of a State, held beyond its province in *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S.

495? Or, in other ways, to change, in accordance with its own conceptions, the pattern of the entire social and economic life of the country?

The theory underlying this argument, we submit, runs counter to views long held and consistently expressed by this Court, that federal powers cannot be used legitimately solely to achieve a purpose plainly within State power. As Chief Justice Marshall put it in a much-quoted paragraph in *McCullough* v. *Maryland*, 4 Wheat. 316, 423:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Again in *Linder* v. *United States*, 268 U. S. 5, 17, this Court said:

> "Congress cannot under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress, ostensibly enacted under power granted by the constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States is invalid and cannot be enforced."

That doctrine is as applicable to the power to lay taxes and appropriate the proceeds as it is to any other federal power. With specific reference to the power to tax, Chief

Justice Marshall said, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 199:

> "Congress is not empowered to tax for those purposes which are within the exclusive province of the States."

And in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541, this Court, while construing the taxing power broadly, specifically stated:

> "There are indeed certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

The test is not whether the purposes or ends which it is sought to accomplish are achieved by coercion, but whether, however achieved, they are the kind of purposes or ends which have been entrusted to the Federal Government. Were any other test applied we should have a centralized, not a federal, system.

All powers granted by the Constitution are subject to the fundamental qualification that the federal nature of our government must be maintained.* The possibility that particular legislation might impair the dual system of government, which it was the purpose of the Constitution to preserve, has been adverted to by this Court as a reason for holding it invalid. See *Child Labor Tax Case*, 259 U. S. 20, 37, 38; *A. L. A. Schechter Poultry Corpora-*

* The necessity of maintaining our dual system of government is the basis for the reciprocal immunity from taxation enjoyed by instrumentalities of the Federal and State governments. See *Board of Trustees of the University of Illinois* v. *United States*, 289 U. S. 48, 59; *Willouts* v. *Bunn*, 282 U. S. 216, 225; *The Collector* v. *Day*, 11 Wall. 113, 127.

tion v. *United States,* 295 U. S. 495, 548. As was said in *Keller* v. *United States,* 213 U. S. 138, 149:

> "While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. *Fairbank* v. *United States,* 181 U. S. 283. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White,* 7 Wall. 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'"

We submit, therefore, that since the Act raises and appropriates money only to accomplish the fixing of prices and the adjustment of production of agricultural commodities, which Congress is powerless to accomplish by direct legislation, it cannot be sustained as a legitimate exercise of the power to lay taxes and raise revenue.

III.

SINCE THE PURPOSE OF THE PROCESSING TAX IS TO COMPEL PROCESSORS TO PAY PREDETERMINED PRICES FOR AGRICULTURAL COMMODITIES, IT IS NOT A TAX, BUT IS A POLICE MEASURE AND BEYOND THE POWER OF THE FEDERAL GOVERNMENT

We have attempted to demonstrate that inasmuch as the ultimate purpose of the Agricultural Adjustment Act is to increase the purchasing power of the farm population by controlling the production of agricultural commodities it is not a revenue measure, and the processing tax, viewed as a means of achieving that end, is not an exercise of the power to lay taxes. The processing tax,

however, has another and more immediate object—namely to compel payment of parity prices to the farmer during the period necessary for the consummation of the adjustment program.[10] In this aspect, the processing tax is nothing less than a device for the direct fixing of prices, in addition to being designed to regulate prices indirectly through control of production as we have already pointed out. This may be illustrated by further reference to the Wheat Adjustment Program as a typical example.

At the inception of the wheat program the parity price was determined to be considerably in excess of the market price, the difference being estimated at thirty cents per bushel. Obviously, the reduction of planted acreage would not result in an immediate equalization of these prices, and since it was thought necessary to improve the purchasing power of the farmer without delay, the plan contemplated that the difference should be made up to the producer by the Government. The Secretary of Agriculture accordingly proclaimed on June 20, 1933, that rental or benefit payments would be made with respect to wheat and that on and after July 9, 1933, the beginning of the marketing year, there should be levied on the processing of wheat a "tax" at the rate of thirty cents per bushel.[11]

The rate of the benefit payments with respect to wheat was, of course, like the rate of tax, predicated on the difference between the farm and parity prices. Since, however, it was estimated that the expense of administering the wheat plan would be approximately two cents per bushel annually, and it was desired that the adjust-

[10] "The second way in which the processing tax and benefit plan helps farmers is in making a direct contribution to their income." U. S. Dept. of Agriculture, *Agricultural Adjustment*, p. 10.

[11] U. S. Dept. of Agriculture, Wheat Regulations, Series 1 (June, 1933).

ment programs should be self-supporting, the rate of payments for the first marketing year (1933-34) was fixed at twenty-eight cents per bushel.[12] In 1934 this was increased to twenty-nine cents per bushel.[13] Payments were limited to that part of the farmer's base production (i.e. average production during the three preceding years) which it was estimated would be domestically consumed.[14] In 1933 this amounted to fifty-four per cent.[15] Processing taxes are similarly confined to wheat consumed in the United States, wheat ground for export being exempted from the operation of the tax. (See Section 17 of the Act.) Thus an approximate balance is maintained between the amount of benefit payments and the amount of processing taxes collected with respect to wheat.

It is apparent, therefore, that except for a small deduction for administrative expenses the thirty cents paid by the processor with respect to each bushel of wheat ground is paid over to the cooperating farmer for each bushel he is expected to produce for domestic consumption. The processor is compelled to pay a fixed "parity" price, consisting of the market price plus the tax, and the farmer is given the proceeds of the tax to make up the parity price to him. Since both the market price and the parity price change from time to time, it

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[12] U. S. Dept. of Agriculture, *Handbook of Organization and Instructions* (W-15), p. 3; *Agricultural Adjustment*, p. 49.

[13] U. S. Dept. of Agriculture, *Agricultural Adjustment in 1934*, p. 75.

[14] See U. S. Dept. of Agriculture, *Agricultural Adjustment in 1934*, p. 235:

> "The payments are calculated to make up as much as possible of the difference between what the cooperating farmer sells for consumption in the United States and the price which would place him in the position of parity, relative to the country's other producers, that he occupied in the well-balanced period before the war."

[15] U. S. Dept. of Agriculture, *Agricultural Adjustment*, p. 49.

is provided in the Act that the rate of tax "shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him" to keep it equivalent to the difference between those prices. (Section 9(a).) If this difference becomes permanently and substantially greater or lower than it was at the outset, the rate of tax and benefit payments is correspondingly adjusted to maintain the purchasing power of the farmer at the same pre-war level.[16] If the market price rises to the desired level, the purpose of the Act is accomplished, and the tax is terminated. (Section 13.)

There can be no question that the raising of the market price to the ideal minimum price is the design of the Act. Until this can be brought about by controlling the supply, payment of the ideal price is enforced by statute. The Government intervenes between the purchaser and the producer of wheat and fixes the consideration for the purchase. The Act is, therefore, in the most real and immediate sense, a price-fixing measure.

The Government's assertion to the contrary is patently incorrect. While it may be true that the effect of the processing tax on the prices received by processors for their manufactured products is "no different from that of any other manufacturer's excise" (Brief, p. 28), the purpose and effect of the tax with respect to prices paid by processors for the raw commodities they purchase are immediate and apparent. The incidence of the tax on the processor directly establishes the price he must pay. The tax is, in fact, a concrete part of that price. He cannot use the wheat for the only pur-

[16] While no change has been made in the tax rate with respect to wheat since the inception of the wheat program, this indicates only that the Secretary has not regarded the price fluctuations as symptomatic of any permanent change in the relative price levels. *Cf.* U. S. Dept. of Agriculture, *Agricultural Adjustment*, pp. 7-8.

pose for which he buys it until he has paid the parity price. The taxing machinery of the government merely furnishes a conduit through which the additional payment passes from one party to the other.

It is clear that such price-fixing could not constitutionally be achieved by direct federal regulation. While the fixing of minimum prices by the states has been sustained as an exercise of their inherent police powers (*Nebbia* v. *New York*, 291 U. S. 502), it has long been settled that no general police power resides in the Federal Government, and that federal police regulation is permissible only in aid of, or when purely incidental to, the exercise of the powers expressly delegated to it (*Keller* v. *United States*, 213 U. S. 138; *Kansas* v. *Colorado*, 206 U. S. 46; *Patterson* v. *Kentucky*, 97 U. S. 501). Were Congress to attempt by legislative fiat to decree that no purchaser of wheat should pay therefor less than a specified price, or a "parity price" to be determined from time to time by the Secretary of Agriculture, such a decree would be plainly invalid and nugatory. The Agricultural Adjustment Act accomplishes precisely the same result, and in an even more drastic manner, by directly confiscating the purchaser's money and transferring it to the producer, to the end that the latter may receive the price which the Government conceives to be the price to which he is entitled.[17] From the standpoint of the processor, the tax is comparable to a penalty designed to compel him to pay a predetermined price. This scheme for price regula-

[17] See U. S. Dept. of Agriculture, *Agricultural Adjustment*, p. 10:

"By establishing the parity principle for agriculture, Congress, in the Agricultural Adjustment Act, recognized a fundamental concept of the national recovery program, which is that those large economic groups performing essential functions for society must have a fair share in the national income. The benefit payments may be considered a form of compensation by the rest of society to farmers for their service in supplying food and raw materials."

tion is not in aid of the power to lay taxes, nor is it purely incidental to the exercise of that power. It is an end in itself, apparent on the face of the Act. We submit that such regulation, amounting in truth to confiscation, cannot be validated by invoking the name "tax". Legislation must be tested in terms of purpose and effect, not merely in terms of its mechanical nicety.

IV.

THE PROCESSING TAX IS NOT A TAX BECAUSE ITS IMMEDIATE PURPOSE IS A PRIVATE ONE, AND THE PUBLIC PURPOSE IS SECONDARY AND INDIRECT

We have shown heretofore that the Agricultural Adjustment Act does not purport to be a revenue measure because its ultimate and declared purpose is not to raise revenue but to govern the production of agricultural commodities and fix the prices of such commodities, and that consequently it cannot be sustained as an exercise of the taxing power. We contend further that the so-called processing tax, upon which the entire adjustment program is predicated, is not a tax because its immediate purpose is not primarily a public purpose but a private one—namely, to increase directly the financial resources of a single group—and such effects as it may have on the public welfare are secondary and wholly indirect.

A. The Use to Which the Proceeds of the Processing Taxes Are Appropriated May Be Challenged by the Processor and Considered by the Court

The Government contends that "public policy" precludes the citizen from avoiding the payment of "otherwise valid taxes" by questioning their purpose or the use to which their proceeds are appropriated. (Brief, pp. 122-135.) This argument, we submit, entirely overlooks the fact that it is of the essence of a tax not only that its

primary object is to raise money, but that it is laid for a public purpose. *United States* v. *Railroad Co.*, 17 Wall. 322, 326; *Loan Association* v. *Topeka*, 20 Wall. 655, 664; *Cole* v. *La Grange*, 113 U. S. 1, 6. An exaction of money by the sovereign from the citizen is not made a tax by calling it so. *Nigro* v. *United States*, 276 U. S. 332, 353; *United States* v. *One Ford Coupe Automobile*, 272 U. S. 321. Nor, we submit, is such an exaction a tax because it is collected in the same manner as are taxes, and its proceeds are deposited in the general treasury. Unless the purpose be a public one, the exaction cannot be justified as an exercise of the taxing power, but is a taking of property for private use and thus beyond the power of the government.

It follows that the question whether an exaction is for a public or governmental purpose is inherent in the question whether such exaction can be sustained under the constitutional provision authorizing Congress to lay "taxes." The Government's argument, we submit, confuses the right of the citizen to inquire whether he is being *taxed*, with the practical impossibility of establishing in the usual case that the money of any particular taxpayer is being used for an improper purpose. This Court has held that an individual taxpayer may not bring injunction proceedings to question the constitutionality of an expenditure from the general funds in the Treasury on the ground that such expenditure would result in an increased burden upon the taxpayer, because the potential injury to a single taxpayer is so remote and unascertainable as to give him no standing to apply for equitable relief. In *Massachusetts* v. *Mellon*, 262 U. S. 447, the Court said (p. 487):

> "But the relation of a taxpayer of the United States to the Federal Government is very different. His interests in the monies of the Treasury—partly

realized from taxation and partly from other sources—is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court in equity."

In such a case public policy may properly be regarded as outweighing the interest of the citizen, which is "shared with millions of others" and "is comparatively minute and indeterminable." When, however, a tax is laid for a specific, predetermined object, and all or substantially all of the proceeds are appropriated thereto, the relative importance of public policy as compared with the right of the taxpayer not to have his property taken for any but a public purpose is wholly changed. The taxpayer is not seeking to prevent an expenditure from general public funds in which he has only a remote and indeterminable interest, but is seeking to prevent the collection of a specific amount of money which is about to be taken away from him. He is not merely threatened with the possibility of increased taxes in the future, but is faced with an immediate exaction for a prescribed purpose. Such a case is plainly distinguishable from cases like *Massachusetts* v. *Mellon, supra,* for the taxpayer can show that a definite financial burden is about to be laid on him *only* to provide for the expenditure which he is challenging. There is a direct connection between the exaction and the appropriation. In the words of this Court in *Massachusetts* v. *Mellon, supra,* (p. 488), the taxpayer "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement and not merely * * * suffers in some indefinite way in common with people generally."

In the case of the processing tax, the very Act which lays the tax appropriates its proceeds for purposes which the processor alleges to be unconstitutional. Under Section 12(b) of the Act as it stood before the recent amendments the proceeds of all processing taxes were appropriated to the Secretary of Agriculture for the purpose of making payments under the Act. The rewording of that section by the amendatory Act of August 24, 1935, to provide for an appropriation, not of the proceeds of the taxes, but of "a sum equal to the proceeds" cannot conceal the fact that every dollar collected in processing taxes is destined for use in carrying out the adjustment program. The amendment is, we submit, a mere subterfuge unworthy of serious consideration. Section 9(a), which remains unchanged, still boldly asserts that the purpose of the processing tax is "To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency," that is, by reason of the disparity in prices between agricultural and other commodities. The substantive fact remains clear—that the money exacted from processors is used to make the payments challenged as illegal. The injury to the processor is immediate, substantial and ascertainable.

Under these circumstances, we submit, the right of the processor to challenge the purpose for which his money is to be taken from him is on a par with the right of a land owner to inquire whether the purpose for which the Government seeks to condemn his land is a public one. See *United States* v. *Gettysburg Electric Railway Co.*, 160 U. S. 668. Inquiry regarding the legitimacy of the purpose is "absolutely necessary to the determination of the rights of the parties" (*United States* v. *Realty Co.*, 163 U. S. 427, 433). To say that the "normal functioning of government" will be endangered if those subject to the processing tax are permitted to object to the purposes

for which the tax is imposed (Pet. Brief, p. 123) begs the question, for the very question here is whether the regulation of agricultural production and prices is a normal function of government and may be achieved through an exercise of the power to lay taxes.

B. The Processing Tax Cannot Be Sustained as an Exercise of the Taxing Power, Because Its Immediate Purpose Is A Private One and Such Effects as It May Have on the Public Welfare Are Secondary and Remote

We have demonstrated earlier in this brief (*supra*, pp. 8-17) by reference both to the statute itself and to the practical operation of a typical adjustment program under the statute, that the Agricultural Adjustment Act is frankly designed to redistribute purchasing power and that the proceeds of processing taxes are devoted directly to that end. The tax itself, as we have shown, is a specific levy for the payment of a specifically traceable farm bounty. The Act defines a class of contributors and a class of beneficiaries, and provides for a transfer of funds from the one class to the other for the immediate and declared purpose of increasing the financial resources of the latter.

It is sought to justify this deliberate redistribution of income on the theory that by some favorable adjustment of the farmer's economic condition the general public will ultimately be benefited. But such a speculative and indirect benefit to the public as may conceivably result from the hoped-for rehabilitation of farmer purchasing power is not enough to justify the exaction of money from the processor as being for a public purpose. The precise contention now advanced by the Government has been decisively rejected by this Court in *Loan Association* v. *Topeka*, 20 Wall. 655, *Parkersburg* v. *Brown*, 106 U. S. 487, and *Cole* v. *LaGrange*, 113 U. S. 1.

In *Loan Association* v. *Topeka, supra,* an expenditure of money by a municipality, acting under express authorization from the State legislature, for the purpose of inducing a manufacturing concern to establish a plant in the community was held to be in violation of the state constitution. The necessary funds were to be raised by taxation and were to be donated to the manufacturing company. This Court held that the immediate purpose was to confer benefits upon a private enterprise and that this was a private purpose which would not justify an exercise of the taxing power. In answer to the argument, substantially identical with that advanced by the Government here, that the ultimate object of the appropriation was to benefit the community as a whole, the Court said (p. 665):

> "• • • If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

The principle established by that decision and reaffirmed by this Court in *Parkersburg* v. *Brown, supra,* and *Cole* v. *LaGrange, supra,* is that the raising of money can be sustained as an exercise of the power to tax only if the money is to be put directly to a public use; that there must be a direct connection between the expenditure and the public welfare; that the sovereign may not

deliberately take the property of one citizen and give it to another even though it may be thought that the interests of the public are closely related to the interests of the recipient of the bounty.

There is no inconsistency between this principle and the principle that courts will not normally review a legislative determination that a particular appropriation will be conducive to the public welfare. (See authorities cited at pages 172 to 179 of the Government's brief.) In the *Loan Association* case, *supra,* this Court did not question that the subsidizing of the manufacturing concern by the city would ultimately inure to the benefit of the community as a whole. The statute authorizing the expenditure expressly provided for the encouragement of such "enterprises as may tend to develop and improve such city" (20 Wall. at 657), and it was not suggested that the location of a factory in the city would not in fact make for the general prosperity. Nor do we suggest here that the Court should inquire into the soundness of the economic theory upon which the processing tax is sought to be justified. It may well be that the bestowal of benefit payments upon farmers will, both by increasing their present purchasing power and by inducing them to curtail production in order to increase their purchasing power in the future, contribute in some measure to the economic welfare of the country as a whole. But no matter how accurate may be the Government's conclusions as to the efficacy of the adjustment program and no matter how emphatically it may be asserted that the ultimate and controlling purpose is to enhance the general welfare, it is none the less true here, as in the *Loan Association* case, that the money in question is being used primarily "in aid of projects strictly private or personal" and that the expenditure benefits the public, if at all, in only a "secondary manner" (20 Wall. at 659).

It is, of course, no answer to this argument that "whatever the Government pays for its typical requirements it of necessity pays to individuals" (Pet. Brief, p. 237). There is a vast and obvious difference between the incidental benefit received in the form of compensation for goods or services furnished the government and the deliberate enhancement of the purchasing power of an individual through grants of money for that express purpose.

The petitioner points out (Brief, pp. 234-236) that certain of the state courts have sustained, as being for a public purpose, appropriations for relief of "group distress".[18] It is a sufficient answer, we submit, that the statute here involved is not a relief measure. The right to benefit payments does not in any way depend upon the plight of the individual farmer, but upon his willingness to submit to the Government's regulations regarding the planting of crops. Relief of physical suffering has historically been regarded as an exception to the general rule that the power to tax and appropriate may not be used in aid of individuals.

No case is cited by the Government in which an expenditure of this character has been sustained by a federal court. *Green* v. *Frazier*, 253 U. S. 233, and *Jones* v. *Portland*, 245 U. S. 217, are plainly distinguishable. The decisions in those cases turned on the fact that the enter-

[18] The authorities cited on page 235 of the Government's brief as illustrative of a more liberal tendency on the part of courts in recent years dealt with measures for the relief of persons suffering from catastrophes such as cyclones and drought, and in those cases the courts were at pains to assimilate the facts justifying the expenditures to cases involving relief of poverty and physical distress. Indeed, in *State ex rel. Cryderman* v. *Wienrich*, 54 Mont. 390, the appropriation was expressly sustained under a constitutional provision authorizing counties to provide for those "who, by reason of age, infirmity or other misfortune, may have claims upon the sympathy and aid of society."

prises to be supported by taxation were being operated by the respective governments themselves—a state in the one case and a municipality in the other. *Loan Association* v. *Topeka, supra,* was cited in both cases with approval, the Court carefully pointing out in *Green* v. *Frazier* (p. 242) that "This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Citizens' Savings & Loan Association* v. *Topeka,* 20 Wall. 655, 665", and saying in *Jones* v. *Portland,* at p. 221:

> "* * * It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State. *Citizens' Savings & Loan Association* v. *Topeka,* 20 Wall. 655".[19]

In *Dodge* v. *Mission Township,* 107 Fed. 827, the Circuit Court of Appeals for the Eighth Circuit held invalid a state statute authorizing townships to subscribe for stock in privately owned sugar mills and for that purpose to issue bonds and levy taxes to pay the principal and interest thereof.

An appropriation strikingly similar to the benefit payments here in question was involved in *Miles Planting Co.* v. *Carlisle,* 5 App. D. C. 138. An Act of Congress provided for payment of bounties on the production of sugar, and this was held unconstitutional in a carefully considered opinion as being for a private rather than a public purpose. No appeal was taken from that decision, and, in fact, the Government relied upon it in *United States* v. *Realty Co.,* 163 U. S. 427, as authority for its contention

[19] The *Loan Association* case has been cited by this Court as authority for the same proposition, as recently as last term. See *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 601.

that a later statute providing for payments to sugar producers who had complied with the conditions of the bounty act was likewise invalid.

In both the *Dodge* case and the *Miles Planting Co.* case, *supra*, the ultimate purpose of the expenditures was manifestly to promote the public welfare, and this was strenuously urged. But the courts in both cases adhered to the principle laid down by this Court that a remote or secondary benefit to the public is not sufficient to justify the expenditure of public funds or the raising of funds by taxation.

This principle is, we submit, applicable to state and federal taxation alike. The Government's contention that a determination of Congress regarding the purpose of an appropriation should be less carefully scrutinized by the courts than a similar determination on the part of a state legislature is beside the point. It derives no support, we submit, from the statement in Judge Cooley's treatise on taxation which is quoted in part at pages 230 and 231 of the Government's brief. A reading of that statement in its entirety (1 Cooley, Taxation, 4th ed., Sec. 178) makes it clear that the distinction drawn in respect of the scope of judicial review was between municipal and state taxation, and not between the powers of the Federal Government and those of the States. Thus, after pointing out that a municipal government is one of limited authority, Judge Cooley goes on to say:

> "* * * It is otherwise with the State, which has all the power of taxation not withheld from exercise in the making of the state and federal constitutions, and in support of whose action, consequently, the most liberal intendments are to be made. * * * "

This is to the same effect as the statement, quoted in the petitioner's brief, regarding the breadth of the powers of the Federal Government.

Moreover, such distinction as Judge Cooley draws between the federal and state governments has no bearing on the question whether the scope of judicial review differs in the two cases. He merely points out that there may be "a public purpose as regards the Federal Union, which would not be such as a basis for State taxation", because "the purpose must in every instance pertain to the sovereignty with which the tax originates." Thus—

> "* * * State expenses are not to be provided for by federal taxation, nor federal expenses by state taxation, because in neither case would the taxation be levied by the government upon whose public the burden of the expenses properly rests."

It does not follow that the Congress should be allowed a greater latitude of discretion than would be conceded to a state legislature in determining whether the object of an expenditure will be conducive to the welfare of its particular public. Each legislative body, within its sphere of operations—the nation or the state—must be accorded equally broad powers in deciding what will be in the public interest. As has previously been pointed out, we do not contend that the question whether curtailment of agricultural production and the raising and expenditure of money to that end will promote the welfare of the nation need be reviewed by this Court. For present purposes it may be conceded that the decision of Congress on that question, unless plainly in abuse of its discretionary powers, is not subject to judicial review. The question which we conceive to be a justiciable question is whether the possibility, or even the probability, that disbursement of the proceeds of a levy in aid of

private enterprise will indirectly benefit the general public characterizes and justifies the levy as an exercise of the power to levy taxes. As to this question, we submit, the principles laid down by this Court in *Loan Association* v. *Topeka, supra,* in respect of the constitutional authority of a sovereign state are equally relevant to the constitutional power of the Federal Government.

CONCLUSION

We submit that the decree of the court below should be affirmed.

Respectfully submitted,

CHARLES B. RUGG
Amicus Curiae

FRANK J. MORLEY,
THOMAS NELSON PERKINS,
WARREN F. FARR,
ROPES, GRAY, BOYDEN & PERKINS,
KINGMAN, CROSS, MORLEY & CANT,
Of Counsel.

December, 1935.

APPENDIX.

I.

OFFICIAL STATEMENT OF THE WHEAT ADJUSTMENT PLAN

ISSUED BY THE

AGRICULTURAL ADJUSTMENT ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE,

WITH THE APPROVAL OF

THE PRESIDENT

June 16, 1933

PLAN FOR APPLYING THE AGRICULTURAL ADJUSTMENT ACT TO THE 1933, 1934, AND 1935 WHEAT CROPS

The Secretary of Agriculture, Henry A. Wallace, and Administrators George N. Peek and Charles J. Brand of the Agricultural Adjustment Administration, with the approval of the President, announce the following plan of cooperation between the Government and the wheat growers of the United States to bring supply and demand into better balance, and growers' income on the domestic consumption of wheat to the parity intended by the Act:

1

Benefits in consideration of cooperation will be paid annually in 1933, 1934, and 1935, on allotments based on the domestically consumed part of the preceding 3-year average production of each wheat grower who signs a contract to reduce acreage for 1934 and 1935 crops, if required.

2

In order to receive such payments, the grower must cooperate as follows:

(*a*) Agree, if required, to reduce his wheat acreage for 1934 and 1935 by not more than 20 percent of his average acreage during the 3-year base period, and (*b*) sow to wheat in a workmanlike manner the number of acres that, at his average yield for the 3-year base period, should produce the number of bushels allotted to him and on which his payments are based.

3

The allotment of each grower is his proportionate share of the total amount domestically consumed, and bears the same proportion to the total domestic consumption as his average 3-year production bears to the average total 3-year production.

4

On the basis of information already available in the Department of Agriculture, each State will be allotted for the purpose of determining payments that number of bushels of wheat which represents its proportion of the average domestic consumption for the base period. The county allotments, in turn, will be apportioned on the same basis. Within the county the allotments to individual farmers will be made by the county Wheat Production Control Association and these allotments will be published in the county press.

5

Wheat producers in any county who, by signing the agreement, become eligible to receive benefits in consideration of cooperation, shall organize a county Wheat Production Control Association, choosing its director, whose salary and expenses will be withheld pro rata from payments to be made within the county. While the plan, which includes both a contract and a payment offer, is to be made generally to wheat farmers throughout the

United States, it is thought that in counties producing less than 100,000 bushels, possibly 200,000 bushels, of wheat annually, wheat farmers may not feel justified in organizing county Wheat Production Control Associations. Operation of the plan will be decentralized in order to administer it efficiently and satisfactorily. Extension Service agencies will be used wherever available, supplemented by temporary emergency workers appointed to serve in counties where there are no county agents or where additional help is required.

6

Distribute two thirds of the payments about September 15, provided the plan gets under way and is carried through as scheduled. The remaining one third will be paid upon evidence of fulfillment of contract as to acreage planted in the fall of 1933 or spring of 1934. The grower who fails to carry out his acreage agreement forfeits his right to participate in further payments in 1934 and 1935.

7

Collect a processing tax, beginning with the 1933 marketing year, to be proclaimed by the Secretary of Agriculture. Such tax will be the amount provided in the law with such adjustments thereafter as may be necessary to effectuate the purposes of the Act. In fixing the amount of the payments to farmers the Secretary of Agriculture will have due regard to the estimated amount of tax proceeds.

8

Supplementing this plan, every effort will be made to dispose of existing surplus supplies in foreign markets. The Agricultural Adjustment Administration will coop-

erate with existing agencies to facilitate export movement of wheat as authorized by the Act.

9

A study will be made of the practicability of taking out of the market a portion of the supply of types of wheat produced this year in excess of requirements. Any supplies of wheat acquired in this manner might be disposed of through relief agencies such as the American Red Cross.

10

The broad economic purposes of this plan are to bring about a balance between production and effective demand and, in the public interest, to stimulate the buying power of agriculture. This increased buying power should result from distribution of payments among wheat farmers. A tentative estimate indicates that at least $135,000,000 would be distributed among the wheat-producing farmers who sign acreage agreements. It is estimated that the whole plan could be accomplished at an annual administrative cost not to exceed 2 cents per bushel.

11

In general, the plan is intended to obtain for the wheat growers, who will cooperate with the Agricultural Adjustment Administration by agreeing to adjust production, a sum equivalent to the parity price on that portion of their production which is required for domestic consumption. This sum will be made up of two parts: (*a*) The prevailing market price at which the grower sells his wheat, and (*b*) the payment made under the Act. The income of the grower will be independent of the prevailing open market price or of the world price at which the

surplus sells. This is exactly what farmers have been asking for.

The plan permits a free supply-and-demand price for wheat to operate in all markets of the United States. When this open market price and the world price for wheat become adjusted the way will be open for the free export movement of American wheat without detriment to the farmers' income on that portion of their wheat required for the domestic markets.

By adopting this plan the Government of the United States will possess the power to bring about acreage adjustments in 1934 and 1935 to conform to whatever agreement may be reached between wheat exporting nations at the London Conference.

12

The formal proclamation of the Secretary of Agriculture required by the Act, that he has determined that payments are to be made in accordance with this plan, will be issued promptly.

13

In direct charge of the production part of the plan are Chester C. Davis, general crop-production director; M. L. Wilson, production chief for wheat; and A. J. Weaver, senior economic specialist for wheat.

Dated June 16, 1933.

II.

Application for Wheat Allotment Contract and Wheat Allotment Contract for 1933.

W-2 (THIS FORM TO BE SENT TO WASHINGTON)

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL ADJUSTMENT ADMINISTRATION

State..... County..... Serial No.....

APPLICATION FOR WHEAT ALLOTMENT CONTRACT

Pursuant to the Agricultural Adjustment Act, approved May 12, 1933, as amended

The Secretary of Agriculture, in accordance with the Agricultural Adjustment Act (hereinafter referred to as the "Act"), proposes to make contracts providing for certain payments (hereinafter defined and referred to as "adjustment payments") to wheat-producing farmers, for the crop years of 1933, 1934, and 1935, who shall agree to make certain reductions in their wheat acreage as set forth herein. Such reductions are for the purpose of furthering the plan of establishing and maintaining a balance between the production and consumption of wheat and the marketing conditions therefor so that the purchasing power of wheat with respect to articles that farmers buy shall be restored to the level of August 1909-July 1914. Farmers who have seeded land to wheat during each or any of the base period years are eligible to make applications to enter into such contracts, with the exception that by reason of prohibitions expressed in title 18, section 204, and title 41, section 22 of the United States Code, no Member of or Delegate to Congress shall be permitted to participate in the benefits of such contracts.

The undersigned (Name and address to be typed or printed)

owner(s) or landlord(s)[1].....
(First name) (Middle initial) (Last name)

.....
(First name) (Middle initial) (Last name)

post-office address(es).....
(Rural route no.) (Box no.) (Post office) (State)

.....
(Rural route no.) (Box no.) (Post office) (State)

tenant .....
(First name) (Middle initial) (Last name)

post-office address.....
(Rural route no.) (Box no.) (Post office) (State)

hereinafter (whether one or more persons) referred to as "the producer" who in the period of production and harvesting of the 1933 wheat crop operated a farm known as the.....farm, consisting of.....acres, situated.....
(Miles and Direction)

from.....on.....Road, in.....Township, of
(Town)

.....County, State of.....

—OR—

described as the.....of section.....township....., range
....., ...from.....in.....County,
(Miles and direction) (Town)

State of....., hereby offer(s) to enter into a contract with the Secretary of Agriculture (hereinafter referred to as "the Secretary") for the purpose of reducing the acreage in wheat on the farm mentioned above (hereinafter referred to as "this farm") for the crop years 1934 and 1935 by an amount to be prescribed by the Secretary.

Some of the more important terms used in this application and in the contract which will be entered into if this application is favorably acted upon are defined as follows:

A "crop year" is a period in which a wheat crop is both seeded and harvested, and is designated by that calendar year in which the crop is harvested.

The "average annual acreage" is that annual average (in acres) of the land now in this farm seeded to wheat in the period of crop years (not to exceed five) up to and including 1932, determined by the County Allotment Committee for the county or for this farm, for the purpose of arriving at a representative average acreage and production for this farm, as a basis for determining the farm allotment.

The "contracted acreage" is that number of acres which the producer agrees to take out or keep out of wheat production.

[1]Strike out word which does not apply. If none of the words given is applicable substitute an appropriate word.

The "farm allotment" is that number of bushels of wheat upon which adjustment payments may be made to the producer and is to be determined by the County Allotment Committee on the basis of the average annual production in the base period for this farm as compared with the average annual production in or for the county in the base period.

The "base period" is that consecutive series of crop years prior to and including 1932, not to exceed five, from which by a study of the wheat acreage and production on the land now in this farm a representative average acreage and production can be obtained for the purpose of determining the farm allotment. The base period shall be determined and fixed in a manner which will be explained to the producer by the County Allotment Committee and the base period for this farm will be inserted in this application by that Committee.

The "adjustment payment" is that amount which added to the current average farm price of wheat per bushel (as determined by the Secretary of Agriculture for each crop year) will tend to increase the purchasing power of the producer's farm allotment to that level which wheat had on the average throughout the United States, in terms of commodities which farmers buy, in the period August 1909—July 1914.

The "Wheat Production Control Association" is an organization (formed pursuant to the regulations) of the wheat producers of the county who have signed wheat-allotment contracts and who have associated themselves together for the purpose of cooperating with the Secretary of Agriculture and with the Agricultural Adjustment Administration in making effective the provisions of the Agricultural Adjustment Act.

The "County Allotment Committee" is a committee composed of three members of the county board of directors of the Wheat Production Control Association in the county elected by the board. One of the three members must be the president of the association.

The "wheat parity price" for any stated period is that average farm price, for that period, of wheat per bushel throughout the United States which is equal in purchasing power, in terms of commodities which farmers buy, to that purchasing power which a bushel of wheat had on the average throughout the United States in the period August 1909—July 1914, and shall be determined by the Secretary.

The "adjusted average annual acreage" is an adjustment of the producer's report of his average annual acreage, such adjustment to be made in the manner provided in the regulations.

The "regulations" are regulations heretofore or hereafter prescribed by the Secretary applicable to the subject matter of this application and of the contract provided for herein.

Some of the more important clauses of such contract are summarized as follows:

(1) In no event is the amount of acreage reduction to be prescribed by the Secretary for either of the crop years 1934 or 1935 to be greater than 20 percent of the average annual acreage seeded to wheat on this farm.

(2) As a consideration for the prescribed reduction in acreage for the crop years 1934 and 1935, which shall be the amount to be proclaimed by the Secretary prior to the beginning of each respective marketing year, there shall be made to the producer an adjustment payment in two parts in respect to the wheat crop for the crop year 1933 as computed on the basis of the farm allotment. Such total adjustment payment shall be in an amount not less than 28 cents per bushel of the farm allotment, subject to a deduction for the producer's pro rata share of the administrative expenses in his county. If the current average farm price of wheat per bushel (determined in accordance with the regulations) with respect to the crop year 1934 is below the wheat parity price, then there shall be made to the producer an adjustment payment in respect to the wheat crop for the crop year 1934. If such current average farm price for the crop year 1935 is below the wheat parity price, then there shall be made to the producer an adjustment payment in respect to the wheat crop for the crop year 1935.

(3) The full adjustment payment for the crop year 1933 will be made only if the producer for such crop year seeded an acreage of wheat on the land now in this farm sufficient, at the average yield for the base period, to produce the farm allotment, unless the failure to seed such an acreage is clearly shown to have been due to the producer's regular rotation practice. If for such crop year the seeded wheat acreage on this farm was less than such as would have produced, at the average yield for the base period, the farm allotment and if the failure to seed such an acreage was not due to the producer's regular rotation practice, then the adjustment payment for such crop year will be made only on the amount of wheat which, at the average yield for the base period, would have been produced on the seeded acreage. Such amount will be determined by the County Allotment Committee.

As a basis for determining the farm allotment, the annual average acreage, and the amount of the adjustment payments, there are attached hereto statements by the producer of the acreage and production during the base period for the land now in this farm, and the producer is also to furnish to the County Allotment Committee a statement showing the disposal of the wheat produced on this farm during the base period, evidenced by certificates of purchasers or other evidences of production and sale. All statements made by the producer in this application are matters of public interest and concern and the producer agrees that they may be published in one or more local newspapers.

The producer agrees that all records of past wheat acreages, production, and sales for this farm for the base period, whether in the hands of the producer or of any other person or agency, shall, so far as the producer is able to do so, be made available for inspection by an authorized agent of the Secretary, and the producer expressly waives any right to have such records kept confidential.

The producer agrees to submit any further evidence concerning this application which may be requested by the County Allotment Committee.

The producer hereby applies for membership in the Wheat Production Control Association in his county. When this application is hereinbelow certified by the County Allotment Committee and a wheat allotment contract is entered into between the Secretary and the producer, then under the terms of such contract the producer

will be bound by the articles, bylaws, rules, and regulations of such association and will be bound to bear his pro rata share of the administration expenses of such Association.

This application and such contract, filed in the office of the Secretary of Agriculture, shall be subject to the regulations of the Secretary.

1933 crop acreage

Crop	Acres seeded or planted	Crop	Acres seeded or planted	Crop	Acres seeded or planted
Winter wheat (1)		Oats (5)		Cotton (9)	
Spring wheat (2)		Barley (6)		Potatoes (10)	
Durum (3)		Rye (7)		Acres in tame hay (11)	
Corn (4)		Tobacco (8)		Acres fallowed or idle (12)	

WHEAT acreage and production for the land now in this farm including shares of both owner or landowner and tenant

(This application cannot be accepted unless the information called for in the spaces below is fully set forth for the base period years)

Year	Acres seeded A.	Acres harvested B.	Total production, bushels C.	Adjusted production bushels [2] D.
1928 [2]				
1929 [2]				

[2] The years 1928 and 1929 are to be filled in only if the producer is eligible for a 4- or 5-year base period as above provided.

1930				
1931				
1932				
Total				
Average				

[3] Producer is not to fill in this column.

If this farm is operated by a tenant—

1. What was the share basis of the 1933 lease?

owner or[4] landlord .....

tenant[4] .....

2. When does the lease with the present tenant terminate? .....

If this farm is operated in any other manner than as set forth above, what was the basis of such operation? .....

The statements contained herein are true to the best of my (our) knowledge and belief and shall become a part of the wheat allotment contract which may be offered.

Witness: .....

(Signature)

..... } owner(s) or[4] landlord(s)

(Signature)

..... (Signature)

..... (Date), 1933.

Witness: .....

(Signature)

..... (Signature), tenant.

..... (Date), 1933.

NOTE.—Only the signature of the tenant is necessary on the application where the owner or landlord or a duly authorized agent of the owner or landlord is not available for immediately obtaining his signature. But before a contract will be executed by the Secretary, a duplicate copy of the application must be signed by the owner or landlord or his duly authorized agent.

[4] Strike out word which does not apply. If none of the words given is applicable, substitute an appropriate word.

(PRODUCER IS NOT TO WRITE ANYTHING BELOW THIS LINE)

Community Committee Certification of Application

The documents listed below have been verified and are attached to the form of this application which is to be retained by the County Allotment Committee:[5]

- ☐ 1. Sketch map of this farm.
- ☐ 2. Statement of disposal of 1928, 1929, 1930, 1931, and 1932 wheat crops.
- ☐ 3. Thresherman's certificates for 1928, 1929, 1930, 1931, and 1932 wheat crops.
- ☐ 4. Certificates of purchase of wheat 1928, 1929, 1930, 1931, and 1932 crops.

We hereby certify that we are personally familiar with the farm covered by this application and that the statements in the application and in the above-listed documents as given, pertaining to the base period and the crop year 1933, are correct to the best of our knowledge and belief.

If not correct, indicate in what way or ways.....

.....

....., 1933.
(Date)

Signed .....

.....

.....
(Community Committee)

County Allotment Committee Certification of Application

We hereby certify that we have considered the above application and the report of certification of the community committee and have determined for this farm the following:

1. Base period ..... years.
2. Average annual acreage seeded to wheat (based on crop years 1928, 1929, 1930, 1931, and 1932[6]) ..... acres.
3. Average annual production of wheat (based on crop years 1928, 1929, 1930, 1931, and 1932[6]) ..... bushels.
4. Farm allotment ..... bushels.
5. Division of adjustment payments, in accordance with present share lease (if any):

.....percent to....., ... as landlord[7]
(Name) (Address)

.....percent to....., ... as tenant[7]
(Name) (Address)

and recommend that the Secretary of Agriculture enter into a wheat allotment contract with the producer on the basis of such facts.

....., 1933.
(Date)

Signed .....

.....

.....
(County Allotment Committee)

Any intentional misrepresentation of fact made in this application for the purpose of defrauding the United States will be subject to the criminal provisions of the United States Code.

[5]Indicate by check in box the number of any document which has *not* been attached hereto and strike out years for which no documents are attached.
[6]Strike out years not applicable.
[7]Strike out word which does not apply. If none of the words given is applicable substitute an appropriate word.

U. S. GOVERNMENT PRINTING OFFICE: 1933 8—8338

W-8

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL ADJUSTMENT ADMINISTRATION

STATE..... COUNTY..... SERIAL NO.....

MAP OF FARM

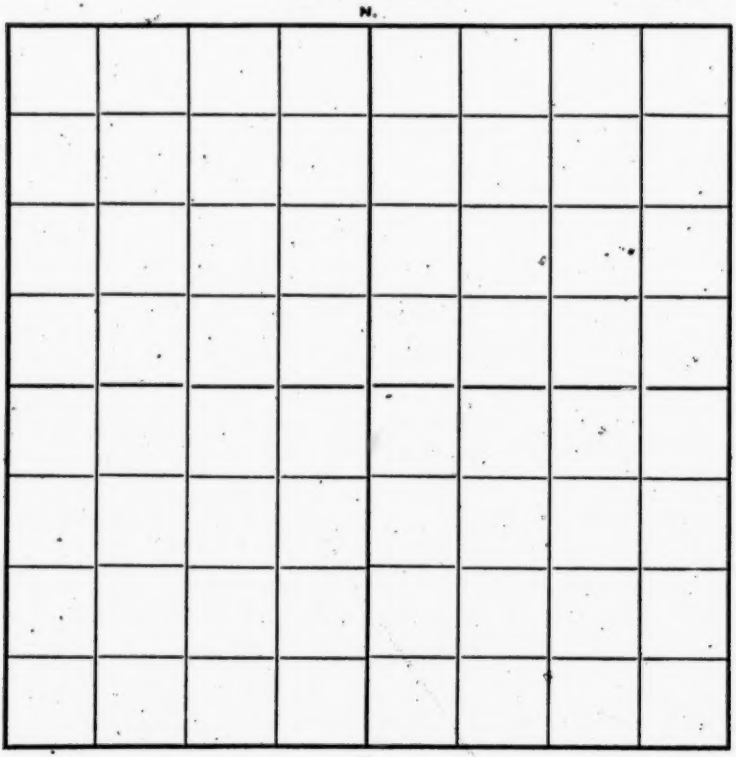
For use in public-land states

Draw or have agent draw a complete map of the land you are farming in 1933 which is covered by this application.

1. Show size and shape of each field in farm.
2. Write in the crop and acreage for each field.
3. Show the location of the house, barns, and road leading to the farm.
4. Show the location and acreage of all woods and pasture lands.
5. Total crop land, ...acres.
6. Total size of farm, ...acres.
7. This map must be complete for purposes of certification in 1933, 1934, and 1935.

Four (4) Sections 8—8335 a

N.



W. E.

S.

This farm is described as the.....of section.....; the.....of section .....; the.....of section.....; the.....of section....., township..... ....., range.....

U. S. GOVERNMENT PRINTING OFFICE 1933

W-8a

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL ADJUSTMENT ADMINISTRATION

STATE COUNTY SERIAL NO.....

MAP OF FARM

For use in non-public-land states

Draw or have agent draw a complete map of the land you are farming in 1933 which is covered by this application.

1. Show size and shape of each field in the farm.
2. Write in crop acreage for each field.
3. Show the location of the house, barns, and road leading to the farm.
4. Show the location of all woods and pasture lands.
5. Total crop land, ...acres.
6. Total size of farm.....acres.
7. This map must be complete for purposes of certification in 1933, 1934, and 1935.

8—8335 e

N.

W. E.

S.

This farm is described as.....from.....
(Miles and directions)

on.....Road, in.....Township,

of.....County, State of.....

W-9 (THIS FORM TO BE SENT TO WASHINGTON)

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL ADJUSTMENT ADMINISTRATION

State..... County..... Serial No.....

WHEAT ALLOTMENT CONTRACT

Pursuant to the Agricultural Adjustment Act, approved May 12, 1933, as amended

(Name and address to be typed or printed)

The undersigned,

owner(s) or[1] landlord(s), ...
(First name) (Middle initial) (Last name)

.....
(First name) (Middle initial) (Last name)

post-office address(es).....
(Rural route no.) (Box no.) (Post office) (State)

.....and
(Rural route no.) (Box no.) (Post office) (State)

tenant .....
(First name) (Middle initial) (Last name)

post-office address.....
(Rural route no.) (Box no.) (Post office) (State)

hereinafter (whether one or more persons) referred to as "the producer", who during the period of production and harvesting of the 1933 wheat crop operated a farm which is described in the application for wheat allotment contract heretofore executed by the producer and certified by the County Allotment Committee (hereinafter referred to as "the application"), hereby contract(s) with the Secretary of Agriculture, upon the terms and conditions hereinafter set forth and subject to the regulations (which shall be deemed to be part of the terms and conditions of this contract) heretofore or hereafter prescribed by the Secretary pursuant to the above Act.

For the purposes of this contract the terms "Secretary", "regulations", "Act", "average annual acreage", "base period", "farm allotment", "wheat parity price", "County Allotment Committee", "Wheat Production Control Association", and "crop year" shall have, respectively, the meanings assigned to them in the application.

Acceptance by the Secretary shall cause this instrument to become a binding contract between the producer and the Secretary.[2]

1. The acreage to be seeded to wheat for each of the crop years 1934 and 1935 on the above-mentioned farm (hereinafter referred to as "this farm") shall be reduced below the average annual acreage (as fixed in the application) by an amount to be prescribed by the Secretary, but in no event shall such amount of reduction to be prescribed by the Secretary exceed 20 percent of the average annual acreage.[3] Should an international agreement for the reduction of wheat acreage be entered into by the United States, then the acreage reduction specified in such international agreement shall be considered in determining (in such manner as the Secretary by the regulations shall prescribe) the reduction up to such 20 percent, to be thereafter prescribed for this farm. The land taken out or kept out of production pursuant to this contract for the crop year 1934 shall be referred to hereinafter as "the contracted acreage of 1934", and the land so taken out or kept out of production for the crop year 1935 shall be referred to hereinafter as "the contracted acreage of 1935."

In the event that no reduction is prescribed by the Secretary for the 1934 crop year and/or for the 1935 crop year, the acreage seeded to wheat on this farm for such year or years shall not exceed the average annual acreage.

2. There shall be seeded to wheat on this farm for each of the crop years 1934 and 1935 an acreage sufficient, at the average yield during the base period[3] (as fixed in the application), to produce the farm allotment[3] (as fixed in the application) for this farm, i.e., ...acres, which at the average yield for the base period will produce.....bushels, which is the farm allotment for this farm.

3. On the acreage which under the terms of this contract may be seeded to wheat, the methods of production employed shall be such as conform to accepted practices for wheat growing in the locality.

4. The contracted acreage of 1934 and 1935 shall not include land which is waste, gullied, or eroded, and shall be the average of that on which wheat is ordinarily seeded on this farm.

---

[1] Strike out word which does not apply. If none of the words given is applicable, substitute an appropriate word.

[2] By reason of the prohibitions contained in title 18, sec. 204, and title 41, sec. 22, of the United States Code no Member of or Delegate to Congress shall be admitted to any share or part of this contract or to any benefit to arise thereunder.

[3] The producer agrees that the base period, the average annual acreage, and the farm allotment are as fixed by the County Allotment Committee in the application, viz: Base period: Years 19..... to 19....., inclusive. Average annual acreage: ..... acres. Farm allotment: .....bushels.

5. The contracted acreage of 1934 and 1935 shall be posted by the producer in such manner as the Secretary or his authorized agent may direct, or may be posted by an authorized agent of the Secretary.

6. The contracted acreage of 1934 and 1935 shall not be used for the production of any nationally produced agricultural product for sale, but may be used as follows: Summer fallowed; planted to soil-improving or erosion-preventing crops, or to food crops for home consumption on this farm, or to feed crops for the production of livestock (or livestock products) for home consumption or use on this farm.

7. In areas where commercial fertilizer is used, such fertilizer shall not be applied on that portion of this farm which under the terms of this contract may be seeded to wheat for the crop years 1934 and 1935 in an amount per acre in excess of the amount of commercial fertilizer used per acre in the base period on land seeded to wheat on this farm.

8. If any farm other than the one covered by this contract is owned or operated by the producer in 1934 or 1935, such farm shall not be used for the purpose of increasing the wheat acreage thereon in any amount to offset the required reduction on this farm, and a breach of this condition shall be a ground for termination of this contract by the Secretary, and the discontinuance of any further payments hereunder.

9. All undertakings herein of the producer are covenants which shall run with the land and shall be fully obligatory upon all future purchasers, lessees, tenants, and encumbrancers of this farm or any part thereof. In the event that any portion of this farm is sold or otherwise disposed of, the Secretary or his authorized agent shall in writing determine an average annual acreage and a farm allotment for such portion and a new average annual acreage and farm allotment for the remainder of this farm. Such determination shall be final and conclusive. If requested by the Secretary or his authorized agent, the producer shall post on this farm in a conspicuous place, or permit an authorized agent of the Secretary so to post, a notice to be furnished by the Secretary or his authorized agent stating that this farm is subject to the terms of this contract and referring to the matters contained above in this paragraph. The producer shall notify all purchasers, lessees, tenants, or encumbrancers of this farm, or any part thereof, of such matters and shall immediately notify in writing the Secretary and the County Allotment Committee, giving full details, of any change in the legal relationship to this farm of any party herein described as the producer (whether owner, landlord, or tenant).

10. For the purposes of supervision and investigation of the performance by the producer of the terms hereof, the Secretary or his authorized agent shall at all reasonable times have access to this farm and the producer shall keep and make available from time to time for inspection by the Secretary or his authorized agent such records and information relating to this farm as may be requested by the Secretary or his authorized agent.

11. All records of past wheat acreages, production, and sales for this farm for the base period, whether in the hands of the producer or of any other person or agency, shall, so far as the producer is able to do so, be made available for inspection by an authorized agent of the Secretary, and the producer expressly waives any right to have such records kept confidential.

12. (*a*) If this farm is at any time during the existence of this contract operated by a tenant under a cash lease, he shall be considered the producer for the duration of such lease and he shall be entitled to adjustment payments with respect to each entire crop year if his lease exists during that portion of such crop year in which the wheat crop for such year was produced and harvested on this farm and if he is a party to this contract or becomes a party to this contract in the manner hereinafter provided in subparagraph (*f*) of this paragraph (12). The existence and duration of any such lease shall, for the purposes of this contract, be finally and conclusively determined by the County Allotment Committee.

(*b*) If this farm was operated by a share tenant during the period of the production and harvesting of the 1933 crop on this farm, such tenant shall receive his proportion of the adjustment payments for the crop year 1933 as set forth in the footnote hereto.*

(*c*) If this farm is operated by a share tenant during that portion of the crop year 1934 in which the wheat crop for such year is produced and harvested on this farm, such tenant shall receive that proportion of the adjustment payments for said entire crop year fixed in the footnote to subsection (*b*) of this paragraph 12 provided that this farm was, during the period of the production and harvesting of the 1933 crop, operated under a share lease, and in the event this farm was not so operated during such period said share tenant shall receive such proportion of the adjustment payments for the crop year 1934 as may be fixed by the County Allotment Committee, based upon the share lease or leases under which this farm was operated during the base period, and in the event that there was no share lease during the base period said share tenant shall receive such proportion of the adjustment payments for the crop year 1934 as may be agreed upon between him and his landlord and is certified to by the County Allotment Committee.

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*The producer represents that the division of adjustment payments, in accordance with the present share lease, which expires....., fixed in the application, is as follows:

.....percent to....., ...,as landlord,
(Name) (Address)

.....percent to....., ..., as tenant.
(Name) (Address)

(*d*) If this farm is operated by a share tenant during that portion of the crop year 1935 in which the wheat crop for such year is produced and harvested on this farm, such tenant shall receive that proportion of the adjustment payments for said entire crop year fixed in the footnote to subsection (*b*) of this paragraph 12 provided that this farm was, during the period of the production and harvesting of the 1933 crop, operated under a share lease, and in the event this farm was not so operated during such period said share tenant shall receive such proportion of the adjustment payments for the crop year 1935 as may be fixed by the County Allotment Committee, based upon the share lease or leases under which this farm was operated during the base period, and in the event that there was no share lease during the base period said share tenant shall receive such proportion of the adjustment payments for the crop year 1935 as may be agreed upon between him and his landlord and is certified to by the County Allotment Committee.

(*e*) At any time a party hereto shall cease to have any legal relation to this farm, he shall thereupon cease to be a party hereto and (subject, however, to the provisions set forth in this paragraph (12)) his right to all adjustment payments thereafter shall cease.

(*f*) Any person who has not executed this contract, or any person who, having executed this contract, changes his legal relation to this farm, and who may under the terms of this paragraph be entitled to any adjustment payment, or part thereof, may, with the approval of the County Allotment Committee, become or remain, as the case may be, a party to this contract by executing a form therefor prescribed by the Secretary, and shall thereafter be entitled, as provided in said form, to adjustment payments, or parts thereof.

13. If the producer is indebted to the United States in any amount for obligations due at the time adjustment payments are to be made to the producer under this contract, it is understood that such payments may be applied to the reduction or full payment of such indebtedness, and the balance, if any, then paid to the producer.

14. There shall be deducted from the adjustment payments to be made under this contract a sum sufficient to defray the producer's pro rata share of the administrative costs of the Wheat Production Control Association in his county and the producer expressly authorizes the Secretary or the Secretary's authorized agent to make such deductions. Such pro rata share shall be computed on the basis of the number of bushels in the farm allotment.

15. The statements contained herein are true to the best of the knowledge and belief of the producer. The statements and agreements by the producer set forth in or attached to the application and any further statements called for herein shall be agreements, representations, and conditions upon which the Secretary will rely in entering into this contract and shall be continuing agreements, representations, and conditions which are by this paragraph incorporated into and made a part of this contract. If the Secretary determines (and his determination shall be final and bind the other parties hereto) that there has been a material misstatement in any of such statements or any noncompliance by the producer with any such agreements or conditions or with any term hereof or with any of the regulations, he may terminate this contract and thereafter no further payments shall be made hereunder, and any payments theretofore made shall be refunded to the Secretary by the producer and shall constitute, until so refunded, a lien on future wheat crops on this farm. In the event that any person described herein as the producer shall (except as may be provided by regulations) sell or trade in any flour obtained in exchange for or processed from wheat produced on this farm and in respect of which no processing tax has been paid, such person shall thereupon cease to be a party to this contract and shall not thereafter be entitled to any payments hereunder and shall refund to the Secretary any payments hereunder theretofore received by such person.

16. The producer will not sell or assign, in whole or in part, this contract or his right to or claim for adjustment payments under this contract, and will not execute any power of attorney to collect such adjustment payments or to order that any such payments be made. Any such sale, assignment, order, or power of attorney shall be null and void.

17. As consideration for the prescribed reduction for the crop years 1934 and 1935, there shall be made to the producer (subject to the terms of paragraph 12) an adjustment payment in two parts in respect of the 1933 wheat crop to be based upon the farm allotment for this farm. The first payment shall be in an amount equal to 20 cents per bushel of such allotment and shall be made on or after September 15, 1933. The second payment shall be in an amount equal to not less than 8 cents nor more than 10 cents per bushel of such allotment and shall be made not earlier than June 1, 1934, after presentation to the Secretary (in accordance with the regulations) of proof of compliance by the producer with the terms of this contract relating to wheat acreage reduction for 1934; provided, however, that the full adjustment payment for the crop year 1933 will be made only if the producer for such crop year seeded an acreage of wheat on the land now in this farm sufficient, at the average yield for the base period, to produce the farm allotment, unless the failure to seed such an acreage is clearly shown to have been due to the producer's regular rotation practice. If for such crop year the seeded wheat acreage on this farm was less than such as would have produced the farm allotment at the average yield for the base period and if the failure to seed such acreage was not due to the producer's regular rotation practice, then the adjustment payment for such crop year will be made only on the amount of wheat which, at the average yield for the base period, would have been produced on the seeded acreage, and such amount will be determined by the County Allotment Committee.

18. If the current average farm price of wheat per bushel (as determined in accordance with the regulations) with respect to the crop year 1934 is below the wheat parity price, there shall be made to the producer (subject to the terms of paragraph 12) an adjustment payment, in two installments, in respect to the wheat crop for the year 1934. Such total adjustment payment shall be in an amount

determined and proclaimed by the Secretary prior to the beginning of the marketing year 1934. The adjustment payment for the crop year 1934 shall be such as will tend to give the producer the wheat parity price for his farm allotment. The first of the two installments of said adjustment payment shall be in an amount equal to approximately two-thirds of the total adjustment payment for the crop year 1934 and shall be made between July 1 and September 15, 1934; the second installment shall be made on presentation to the Secretary of proof of compliance (in the manner prescribed by the regulations) by the producer with the terms of this contract, but such payment shall not be made until a date after which wheat can no longer be seeded in the locality to produce a crop for the year 1935.

19. If the current average farm price of wheat per bushel (as determined in accordance with the regulations) with respect to the crop year 1935 is below the wheat parity price, there shall be made to the producer (subject to the terms of paragraph 12) an adjustment payment, in two installments, in respect to the wheat crop for the year 1935. Such total adjustment payment shall be in an amount determined and proclaimed by the Secretary prior to the beginning of the marketing year 1935. The adjustment payment for the crop year 1935 shall be such as will tend to give the producer the wheat parity price for his farm allotment. The first of the two installments of said adjustment payment shall be in an amount equal to approximately two-thirds of the total adjustment payment for the crop year 1935 and shall be made between July 1 and September 15, 1935; the second installment shall be made on presentation to the Secretary of proof of compliance (in the manner prescribed by the regulations) by the producer with the terms of this contract, but in any event such payment shall not be made earlier than November 1, 1935.

In witness whereof the undersigned { has / have }[5] executed this contract:

.....
(Signature)
.....
(Signature)
} owner(s) or landlord(s)[5]

Witness:.....
(Signature)

....., 1933
(Date)

....., tenant
(Signature)

Witness:.....
(Signature)

....., 1933
(Date)

Affirmation

The above named....., ...,

and....., being personally known to me, appeared before me and swore to the truth (to the best of { his / their }[5] knowledge and belief) of the statements contained in the above contract and in the application (together with its accompanying documents) this.....day of....., 1933.

....., *Member Community Committee*

(for.....Community).

Acceptance by Secretary

In consideration of and in reliance upon the representations and agreements above set forth or incorporated above in this contract, this contract is hereby accepted in accordance with the terms thereof, this.....day of..... 1933.

HENRY A. WALLACE,
Secretary of Agriculture
(for and on behalf of the United States),

By.....

[5]Strike out word not applicable.

8—8333 U. S. GOVERNMENT PRINTING OFFICE 1933

III.

Application for Wheat Adjustment Contract for 1936-1939 and Wheat Adjustment Contract for 1936-1939.

Wheat-201
U. S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
Division of Grains—Wheat Section

(Temporary Serial No.) | (State and County Code and Contract Serial No.)

APPLICATION FOR WHEAT ADJUSTMENT CONTRACT FOR 1936-1939

(Only one copy of this form need be made)

Section I.—IDENTIFICATION

1. Name of 1936 operator ..... Address .....
2. Name of landlord ..... Address .....
3. Name of landlord's agent (if any) ..... Address .....

The undersigned operator/s and landlord/s (if any) of the farm

4. known as the ..... farm, consisting of ..... acres, situated ..... (Miles and direction)
5. from ..... on ..... road, in ..... Township (Town)
of ..... County,
6. State of ..... —OR—
7. described as the ..... of Section ....., Township (Block) ....., Range (Certificate) .....,
8. ..... from ....., in ..... County (Miles and direction) (Town)

State of ....., in connection with, and in order to induce the Secretary of Agriculture to accept their offer to enter into a Wheat Adjustment Contract for 1936-1939, makes the statements and representations set forth herein as a basis for determining the correct basic figures with respect to the farm to be covered by such contract, as a basis for performance of such contract and the making of adjustment payments thereunder.

9. Was this farm or any part thereof covered by a 1933-1935 Wheat Allotment Contract? (Yes or No) ..... If so, give serial number/s .....; total acreage in farm .....; number of years in base period .....; average annual wheat acreage .....; average annual wheat production .....

Section II.—WHEAT HISTORY OF THE FARM, 1928-1932

CROP OF	OPERATOR'S FIGURES			Calculated yield per seeded acre	COUNTY COMMITTEE'S FIGURES		(To be used by tabulating clerk after receipt of special instructions)			
	Acres seeded	Acres harvested	Total production		Corrected acreage	Corrected production				
	A	B	C	D	E	F	G	H	I	J
10. 1928										
11. 1929										
The years 1928 and 1929 are to be filled in only if the producer is eligible for a 4-year or 5-year base period										
12. 1930										
13. 1931										
14. 1932										
15. TOTAL										
16. AVERAGE										

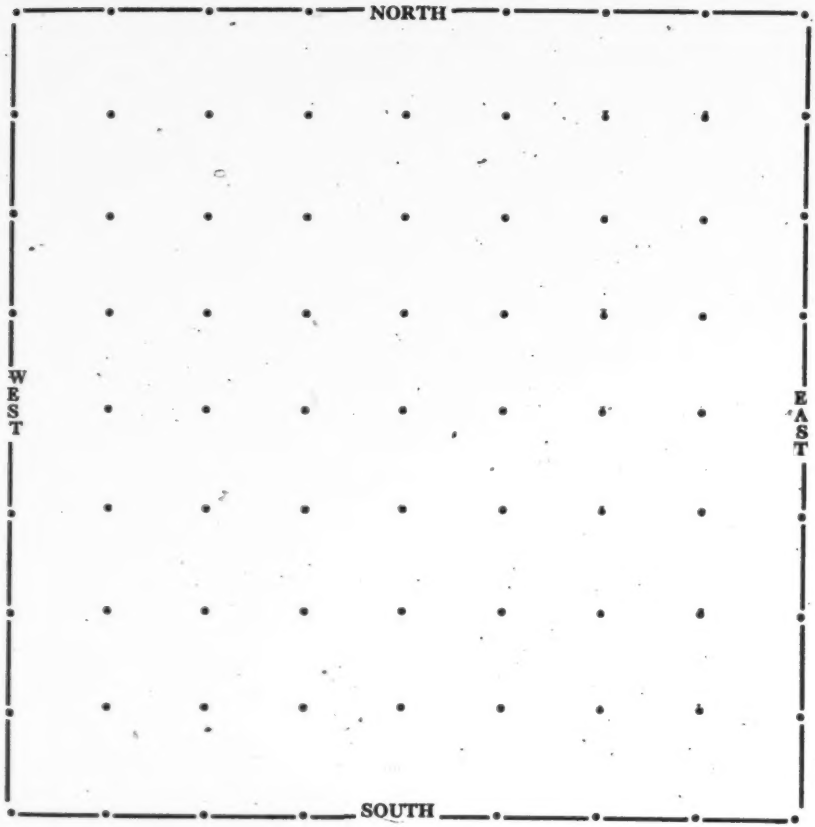
Section III.—WHEAT HISTORY OF THE FARM, 1933-1935

17. 1933					X X X	X X X				
18. 1934					X X X	X X X				
19. 1935					X X X	X X X				

8—9207

Section IV.—PLAT OF TRACT—1935

(These dots will help in drawing in the boundaries of the land and the outline of the fields)



Show the location of buildings, and indicate by a double line public roads adjoining or cutting through the land, private roads and lanes, and open ditches or streams running through the land.

Show size and shape of each field and write on each field the name and acreage of crop planted for harvest in 1935. Also show in parentheses the name of crop in each field planted for harvest in 1934. Designate also noncrop fields as "pasture", "idle", "fallow", "waste", "woods", etc. In showing crops on the plat keep in mind that one purpose of this plat is to show the area seeded to wheat and rye for grain and original seedings of such other crops as were not planted on abandoned wheat and rye land.

Section V.—TOTAL CROP ACREAGE

(To be computed in county office from column C, section VI)

	Acres	Acres
20. Total acreage in farm	x x x	
21. Land in roads, lanes, etc.		
22. Land in woods, waste, etc.		
23. Land in permanent pasture		
24. Wild hay		
25. Subtotal, items 21 to 24, incl.	x x x	
26. Total crop acreage (20) minus (25)	x x x	

Section VI.—FARM ACREAGES

	Operator's Figures		Committee's corrected acres	To be used by tabulating clerk after receipt of special instructions		
	Acres in 1935	Acres in 1934				
	A	B	C	D	E	F
27. Total acreage in farm						
28. Land in roads, lanes, building lots						
29. Land in woods, waste, etc.						
30. Land in permanent pasture						
31. Land in temporary or rotation pasture						
32. Idle crop land (include fallow)						
33. Wild hay						
34. All tame hay (except alfalfa)						
35. Alfalfa						
36.						
	Acres seeded for harvest in 1935	Acres seeded for harvest in 1934	Committee's corrected 1935 acres			
37. Soybeans and cowpeas grown alone						
38. Sweet sorghum and sugarcane						
39. Grain sorghum (Kafir, Milo, etc.)						
40. Corn for all purposes						
41. Rye						
42. Winter wheat						
43. Spring wheat (include durum)						
44. Oats (include oats fed unthreshed)						
45. Barley						
46. Tobacco or flax						
47. Cotton						
48. Potatoes						
49. Sweetpotatoes						
50. All crops not listed above						
51.						

Describe below any special conditions such as double cropping; seedings on abandoned winter wheat and rye land, seedings of mixed grain crops, such as wheat and oats, wheat and flax, etc.

Section VII.—OTHER COMMODITY CONTRACTS

If this farm or any part thereof was covered by a contract in 1935 for a commodity other than wheat, fill out lines 52, 53, and/or 54 below:

Other contract (indicate commodity)	Serial number	Base acres
52.		
53.		
54.		

Section VIII.—BASE PERIOD AND PRODUCTION BASIS

	Number of years in base period	PRODUCTION BASIS (Put X in proper space)	
		Historical	Estimated yield
	A	B	C
55. Operator's requested			
56. Committee's approved			

Section IX.—SUMMARY

	Approved to meet contract quota	Approved pursuant to ruling No. 111	Approved
	A	B	C
57. Total acres in farm	XXX	XXX	
58. Total crop acreage	XXX	XXX	
59. Average annual wheat acreage			
60. Average annual wheat production			XXX
61. Farm allotment	XXX	XXX	
61a. Normal acreage, sect. 8 of Contract	XXX	XXX	

Section X.—BASE WHEAT ACREAGE 1936-1939

	Years	Operator's requested	Committee's approved
		A	B
62.	1936		
63.	1937		
64.	1938		
65.	1939		
66.	TOTAL		
67.	AVERAGE		

Section XI.—TENURE AND DIVISION OF PAYMENT

	NAME OF OPERATOR OF THIS FARM FOR THE CROP YEAR—	Operator's share of wheat crop (percent)
	A	B
68.	1930	
69.	1931	
70.	1932	
71.	1933	
72.	1934	
73.	1935	

		Relationship to farm *	Share of wheat crop (percent)	Committee's approved division of adjustment payment (percent)
		A	B	C
74.	1936 Operator			
75.	1936 Landlord			

* Indicate whether party is owner, cash tenant, fixed-commodity-rent tenant, share-tenant, or tenant on combined share and cash or fixed-commodity-rent basis.

76. If this farm is operated under lease, indicate whether lease is written or verbal .....

Termination date of lease .....

Section XII.—BENEFICIARIES AND SIGNATURES

77. .....
(Name and address of beneficiary named by operator pursuant to section 12c of the Contract)

78. Date....., 193 ....
(Signature of witness) (Signature of operator)

79. .....
(Name and address of beneficiary named by landlord pursuant to section 12c of the Contract)

80. Date....., 193 ....
(Signature of witness) (Signature of landlord)

81. Date....., 193 Certified by .....

U. S. Government Printing Office 8—9207

Wheat 205
U. S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
Division of Grains—Wheat Section

WHEAT ADJUSTMENT CONTRACT FOR 1936-1939

(Pursuant to and in order to effectuate the purposes of the Agricultural Adjustment Act, approved May 12, 1933, as amended)

PART I.—GENERAL PROVISIONS

SECTION 1. *Offer of Contract Signer.*—The undersigned operator/s (and landlord/s if any) of the farm described in Part V of this instrument (each of whom, whether operator or landlord, is referred to hereinafter as the "contract signer") hereby offer/s to enter into a contract with the Secretary of Agriculture (hereinafter referred to as the "Secretary") upon the terms and conditions set forth in this Wheat Adjustment Contract (hereinafter referred to as the "contract").

Any and all administrative rulings and regulations heretofore or hereafter prescribed or approved by the Secretary relating to Wheat Adjustment Contracts (hereinafter referred to as "Rulings") are and shall be a part of the terms and conditions of this contract and shall be binding upon the contract signer as fully and effectively as if set forth herein in full.

The placing of the Secretary's acceptance of this offer in the regular course of mailing shall cause this offer to become a binding contract between the contract signer and the Secretary.

SECTION 2. *Period of Contract.*—This contract shall be effective for the crop years 1936, 1937, 1938, and 1939 (hereinafter referred to as the "contract years") subject, however, to termination pursuant to either section 12*c* or 14*b*, or to termination or suspension as follows:

a. Subject to Rulings applicable to contract signers having established crop-rotation practices, the contract signer may terminate this contract at the end of the contract year 1937, by executing and submitting to the Secretary, through the office of the Wheat Production Control Association of the county or district in which the farm or principal part thereof is located, not later than June 1 of such year, a notice of termination on a prescribed form.

b. The Secretary may suspend the operation of this contract with respect to any contract year by proclamation made not later than July 1 of the next preceding contract year. Unless terminated by the contract signer or the Secretary pursuant to section 12*c*, 14*b*, 2*a*, or 2*c*, or unless further suspended by the Secretary in accordance with this section 2*b*, this contract shall remain in full force and effect during the remainder of the period of the contract following the year or years with respect to which it may be suspended.

c. The Secretary may terminate this contract at the end of any contract year by proclamation made not later than July 1 of such year.

If this contract is terminated or suspended pursuant to the provisions of this section 2 the contract signer shall not be entitled to any payment under this contract for any contract year which succeeds the effective date of such termination or during which the contract is suspended, but, subject to applicable Rulings, upon proof satisfactory to the Secretary of full performance of all the terms and conditions of this contract with respect to any contract year which precedes the effective date of such termination or suspension, shall be entitled to receive, subject to the provisions of section 14 and applicable Rulings, payment for each such preceding contract year.

SECTION 3. *Membership in Association.*—The contract signer hereby applies for membership in the Wheat Production Control Association of the county or district in which the principal part of the farm covered by this contract is located (hereinafter referred to as the "Association") and agrees to be bound by the Articles, Bylaws, Rules, and Regulations of such Association.

PART II.—PERFORMANCE BY CONTRACT SIGNER.

The Contract Signer Agrees:

SECTION 4. *Acreage Adjustment.*—To adjust the acreage seeded to wheat on the farms described in Part V of this contract (hereinafter referred to as "this farm") in each of the contract years, with reference to the base wheat acreage for that year, by such amount as the Secretary may prescribe for such year, provided that the Secretary shall not prescribe for any contract year an adjustment in excess of 25 percent of the base wheat acreage for that year.

SECTION 5. *Maximum Acreage.*—To limit the acreage seeded to wheat on this farm, for each of the contract years for which the Secretary prescribes no adjustment for this farm, to an acreage not greater than the base wheat acreage for that year.

SECTION 6. *Minimum Acreage.*—To seed to wheat on this farm in a workmanlike manner for each of the contract years an acreage equal to not less than 54 percent of the base wheat acreage for that year.

SECTION 7. *Control of Other Farms.*—That if any farm other than this farm is owned, operated, or controlled by the contract signer in any of the contract years, the wheat acreage on such other farm or farms shall be limited in each such year to an amount which will assure that any reduction for such year on this farm will not be offset in whole or in part by any increase in the acreage seeded to wheat on such other farm or farms.

SECTION 8. *Use of Adjusted Acreage and Other Land.*—To use on this farm in each contract year in which the contract is operative, for soil improving or erosion preventing crops, pasture, fallow, forest trees, and such other purposes as the Secretary may prescribe, an acreage not less than the normal acreage devoted to such uses on this farm plus an acreage equal to the total of the adjusted acreage under this and all other contracts with the Secretary with respect to this farm.

SECTION 9. *Assignments.*—

a. Not to sell, transfer, pledge, or assign, in whole or in part, this contract or the right to or claim for any payment hereunder, nor to execute any power of attorney to collect such payment or any order that any such payment be made to any other person.

b. Not to make, before receipt by the contract signer of such payment, any agreement to pay to any other person, or to apply for the benefit of any other person, any payment hereunder or any amount measured thereby.

c. That any such sale, transfer, pledge, assignment, power of attorney, order to pay, or agreement shall be null and void.

SECTION 10. *Access to Farm and Records.*—To permit the Secretary or his authorized agent (including, as used in this section, members of Committees of the Association), for the purposes of investigating the accuracy of the representations made in and in connection with this contract and the performance by the contract signer of the terms and conditions of this contract, to enter this farm (and any other land owned, operated, or controlled by the contract signer) at any reasonable time in order to measure the acreage or determine the production of any agricultural commodity to which this contract is applicable, and to examine any records (regardless of where located and whether in the hands of the contract signer or of any other person or agency; and the contract signer hereby authorizes any such person or agency to permit such examination) pertaining to this farm or to the acreage, production, or sale by the contract signer of any such commodity, and agrees to furnish such information relating to this farm as may be requested by the Secretary or such authorized agent.

SECTION 11. *Schemes or Devices to Defeat Purposes of Act. Relations between Parties to Contract and Change of Legal Relation.*—Not to employ any scheme or device of any sort whatever, the effect of which would be (1) to defeat or impede the effectuation of the purposes of the Act; or (2) to deprive any other party to this contract, or any person entitled under the terms of this contract or applicable Rulings to be a party to this contract, of that share of the adjustment payments or of any other right under this contract to which such person would normally be entitled for any of the contract years. The contract signer represents that no such scheme or device has been employed or adopted in contemplation of the execution of this contract, and further represents that every landlord and/or operator who in such capacity is entitled under any existing lease, contract, or agreement to receive any share of the wheat crop produced on this farm in the contract year 1936, is named as a party to and has executed this contract and that the relation of each such party to the farm and the respective share (determined according to Rulings) of each such party in the adjustment payments for the contract year 1936 are correctly designated in Part VII of this contract.

All payments made for any of the contract years shall be made to the contract signer/s in the proportions stipulated in Part VII hereof unless and until it is established, on an approved form accepted by the Secretary or his authorized agent, that a change has occurred in the legal relation of the parties to this contract, as a result of which, under the terms of this contract and applicable Rulings, one or more other persons have become eligible to become parties to this contract and to receive all or a share of such payments, or that the parties hereto have become entitled to receive shares of such payments different from those stipulated in Part VII of this contract.

Subject to the Rulings, whenever the contract signer during any contract year ceases to have any legal relation to this farm as operator or landlord all his right to any further payments under this contract shall immediately cease.

PART III.—PERFORMANCE BY THE SECRETARY

The Secretary, for and on Behalf of the United States, Agrees:

SECTION 12. *Adjustment Payments.*—As consideration for complete performance by the contract signer/s of all the terms and conditions of this contract, and upon receiving such proof of compliance with the terms and conditions of this contract as the Secretary may require, to make the following payments for the benefit of the contract signer/s:

a. Amount of Payments.—The total adjustment payment for each contract year during which this contract is operative shall be made in two installments computed on the basis of the number of bushels in the farm allotment for this farm. The first installment shall be made at a rate per bushel equal to approximately two-thirds (2/3) of the difference between the average farm price and the parity price of wheat, as of a date, prior to July 1 of the contract year with respect to which the payment is made, to be determined by the Secretary. The second installment shall be at such rate as the Secretary determines will tend to assure the contract signer/s of a total adjustment payment for such year equal to the difference between the amount which would be received for the number of bushels of wheat in the farm allotment at the average parity price of wheat, computed from available statistics of the Department of Agriculture for the 12-month period beginning on July 1 of the year with respect to which the payment is made, and the amount which would be received for that number of bushels of wheat at the average farm price of wheat, similarly computed for the same period.

The contract signer's pro rata share of the administrative expenses of the Association shall be paid to the Association in such installments and at such times as the Secretary may determine and the balance of the total adjustment payment for each year after deduction of the amount paid to the Association shall be paid in the manner hereinafter provided.

b. Time of Payments:

(1) The first installment of the adjustment payment for each of the contract years shall be made as soon as practicable after proof, satisfactory to the Secretary, of compliance by the contract signer/s with all the terms and conditions of this contract for that year.

(2) The second installment of the adjustment payment for each of the contract years shall be made as soon as practicable after proof, satisfactory to the Secretary, of compliance by the contract signer/s with all the terms and conditions of this contract for the next succeeding contract year, provided that the second installment of the adjustment payment for the contract year 1939 or for any previous contract year at the end of which this contract is suspended or terminated by the Secretary pursuant to the provisions of section 2 of this contract, shall be made as soon as practicable after proof, satisfactory to the Secretary, of compliance by the contract signer/s with all the terms and conditions of this contract for that contract year.

c. Persons to Whom Payments will be Made.—All payments under this contract are for the benefit of the contract signer/s and shall be made only to the contract signer/s, except as provided in this section.

(1) *Death, Disappearance, or Incompetency.*—In case any contract signer (*a*) dies, or (*b*) disappears and fails to make claim for his share of any payment to be made hereunder within 6 months after such payment has been administratively approved, or (*c*) is declared incompetent by a court of competent jurisdiction, payments which at the time of any such contingency such contract signer would have been entitled to receive by reason of performance by him of all the terms and conditions of this contract prerequisite to such payments shall, upon proof of such performance, be made to the beneficiary, if any, named in Part VII by such contract signer.

(2) *Attachment, Garnishment, or Other Legal Process.*—In case any attempt is made, by means of garnishment, attachment, execution, or any other legal process or proceeding, to reach or divert to any person other than the contract signer any payment to be made hereunder, the Secretary may terminate this contract as to such contract signer or may suspend all payments which such contract signer would otherwise be entitled to receive hereunder until such time as such contract signer can receive payment free from any such legal process or proceeding.

(3) *Bankruptcy.*—In the event that any party to this contract is involved in bankruptcy or insolvency proceedings, the Secretary may terminate this contract as to such party.

In the event of termination under this subsection *c* as to any contract signer no payment shall be made under this contract of any amount which such contract signer would otherwise be entitled to receive hereunder, but such contract signer shall not, by reason of such termination, be liable to return to the Secretary any payments already made to him unless there has been noncompliance with any of the terms and conditions of this contract.

When the Secretary has determined the existence or nonexistence of a circumstance in the event of which payment is to be made to a contract signer or a beneficiary and has made payment in accordance with such determination, the obligation of the Secretary with respect to the payment so made shall be discharged thereby and neither the contract signer, nor the beneficiary, nor any other person shall have any right against the Secretary or the United States with respect thereto based upon or derived from this contract.

PART IV.—FURTHER AGREEMENTS AND CONDITIONS

SECTION 13. *Covenants.*—All the undertakings, agreements, and obligations of the contract signer are covenants which shall run with the land and shall bind all future transferees, purchasers, lessees, tenants, and encumbrancers of this farm or any part thereof, whether such transfer, purchase, lease, tenancy, or encumbrance has resulted by voluntary act or by operation of law. The contract signer shall notify all transferees, purchasers, lessees, tenants, or encumbrancers of this farm, or any part thereof, of the existence and terms of this contract and shall promptly notify the Wheat Section through the County Allotment Committee in writing of any change in the legal relationship of any contract signer to this farm, giving full details thereof.

SECTION 14. *Noncompliance and Termination.*—Without limitation of any right or remedy of the Secretary conferred by law or this contract, if the Secretary determines (and his determination shall be final and bind all parties hereto) that there has been a material misstatement in any of the statements made by any contract signer in or in connection with this contract, or that there has been any noncompliance by any contract signer with any term or condition of this contract or with any applicable Ruling, or that any contract signer is not, in any of the contract years, a bona fide wheat producer in the manner and upon the terms and conditions indicated in Part VII thereof or in a form submitted to indicate a change in legal relation to this farm (each and all of such contingencies being herein referred to as "noncompliance"), the contract signer shall have the following obligations and the Secretary shall have any one or more of the following remedies:

a. Contract Signer's Obligation to Refund Payments.—Upon demand in writing by the Secretary or his authorized agent, the contract signer shall repay to the Secretary an amount equal to the sum of all payments made hereunder to the contract signer or to another for the contract signer's use or benefit (including the contract signer's proportional share of the expenses of the Association) or such portion of such payments as the Secretary may require, together with interest on the amount of all payments required by the Secretary to be repaid, at the rate of 6 percent per annum from the date of the making of each such payment by the Secretary, and the expense of collection of any such amounts; *provided, however,* that the contract signer shall not be obligated to repay to the Secretary any payments made for any contract year or years prior to that next preceding the contract year in which such noncompliance occurred. This obligation of the contract signer shall exist and continue until fully discharged irrespective of the termination of this contract as provided hereinbelow.

b. Secretary's Rights and Remedies.—The Secretary shall have (1) a lien on all wheat growing or grown on this farm at or after the date of any noncompliance to secure payment of any sums becoming due to the Secretary hereunder; (2) the right to terminate this contract as to any one or more of the parties hereto; such termination shall not, however, affect the obligations of the contract signer under subsection *a* of this section; (3) without terminating this contract as to any party hereto, the right to require any or all persons who have received any payments hereunder to refund to him an amount equal to all or any portion of such payments subject to the exception stated in subsection *a* of this section or to deduct such amount from any payments subsequently becoming due hereunder and to suspend all further payments under this contract until all such deductions and/or refunds have been made; (4) the right to require the contract signer to make disposition, in such manner as the Secretary shall direct, of any wheat produced on this farm in any contract year upon any acreage in excess of that permitted to be planted on this farm under this contract in such year.

STATE .....

COUNTY .....

(Stamp State and county code and contract serial numbers above)

.....
(Name and address of operator (typewritten))

.....
(Name and address of landlord (typewritten))

PART V.—DESCRIPTION OF FARM

Each of the undersigned represents that he is, or during 1936 will be, engaged in the production of wheat upon the farm known as the.....
Farm, consisting of.....acres, situated.....from.....
(Miles and direction) (Town)
on.....Road, in.....Township, of.....
County, State of.....,

—or—

described as the.....of Section....., Township (Block).....,
Range (Certificate).....,.....from....., in
(Miles and direction) (Town)
.....County, State of....., in the capacity and upon the terms stated in Part VII of this contract.

PART VI.—FARM HISTORY, FARM ALLOTMENT, AND BASES

The contract signer represents that the figures set forth below in lines (*a*), (*b*), (*c*), and (*d*) are correct and agrees that the base wheat acreage for this farm for each of the contract years shall be the acreage stated in lines (*e*), (*f*), (*g*), and (*h*), respectively, and that all such figures have been determined in conformity with all Rulings and official instructions.

(*a*) Total acreage in farm..... (*e*) Base wheat acreage 1936.....

(*b*) Total crop acreage..... (*f*) Base wheat acreage 1937.....

(*c*) Average annual wheat acreage ..... (*g*) Base wheat acreage 1938.....

(*d*) Farm allotment in bushels..... (*h*) Base wheat acreage 1939.....

PART VII.—SIGNATURES, RELATION TO FARM, DESIGNATION OF BENEFICIARY, AND STIPULATION FOR DIVISION OF ADJUSTMENT PAYMENTS

Each of the undersigned has represented in connection with his signature his relation to this farm in 1936 and the share of the wheat crop to which he is entitled for 1936, the share (determined pursuant to Rulings) of the adjustment payments to which he is entitled under this contract, and has designated the person to receive payments pursuant to provisions of section 12*c* of this contract if any of the contingencies listed therein occur, and in witness of all the representations and agreements contained in this contract has executed this contract on the date indicated opposite his signature.

Operator

....
(Relation to farm)[1] (Share of wheat crop) (Share of adjustment payment)[2]

.....
(Name and address of beneficiary named by operator pursuant to section 12*c* (typewritten))

Signed in the presence of—

.... [SEAL]
(Signature of witness) (Signature of operator)

....., 193....
(Date)

Landlord

....
(Relation to farm)[1] (Share of wheat crop) (Share of adjustment payment)[2]

.....
(Name and address of beneficiary named by landlord pursuant to section 12*c* (typewritten))

Signed in the presence of—

.... [SEAL]
(Signature of witness) (Signature of landlord)

....., 193....
(Date)

CERTIFICATION OF THE COUNTY ALLOTMENT COMMITTEE

WE HEREBY CERTIFY that the figures in the foregoing Wheat Adjustment Contract have been determined in accordance with all Rulings and official instructions and that to the best of our information and belief the representations made therein and in connection therewith are correct and we recommend that the Secretary accept such contract.

.....

....., 193.... .....
(Date)

.....
County Allotment Committee.

[1]Indicate whether owner, cash tenant, fixed commodity rent tenant, share tenant, or tenant on combined share and cash or fixed commodity-rent basis.

[2]This share, if different from share of wheat crop, has been determined in accordance with the provisions of Ruling No. 128 (Wheat-206).